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Labor Law: A Comprehensive Review of Seventh Circuit Labor and Employment Law Decisions, 1981-82 Term

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LABOR LAW: A COMPREHENSIVE REVIEW OF SEVENTH CIRCUIT LABOR AND EMPLOYMENT LAW DECISIONS, 1981-82 TERM

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INTRODUCTION

The most significant recent development in the Seventh Circuit in the area of labor relations is really a lack of development. In a series of cases, the court unsuccessfully attempted to announce a standard to be applied in testing whether a union has breached its duty of fair representation for purposes of suits brought under § 301 of the Labor Management Relations Act (LMRA). This article will primarily focus on a review of these cases as well as the doctrine itself, analyzing its development in the Supreme Court of the United States and the Court of Appeals for the Seventh Circuit.

The past term (June 1, 1981 to May 31, 1982) also offered some of the more factually interesting labor law decisions in recent years. Rather than selecting and concentrating on several areas, a comprehensive review of many labor law decisions will be provided with the hope that practitioners will find the summarization and commentary valuable as a timely source of Seventh Circuit authority.

Prior Seventh Circuit Reviews have not for the most part discussed developments in areas of labor relations such as Age Discrimination and Title VII actions. The rapid growth and major importance of these types of cases require discussion for this Review to satisfy its basic function of comprehensively summarizing recent circuit developments in the entire field of management-employee relations. While relatively brief and selective, the discussions do highlight key and interesting holdings which will be useful to all employment law practitioners.

THE DUTY OF FAIR REPRESENTATION: ABSENCE OF A SINGLE, MEANINGFUL AND WORKABLE STANDARD

Background

As the recognized exclusive bargaining representative for all unit

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employees,[1] the union is endowed with enormous power over the rights and benefits those employees receive in the working place.[2] The doctrine of the duty of fair representation has evolved as a check against this potentially abusable power and to protect minority and individual interests.[3] It imposes an enforceable duty upon the union to fairly and nondiscriminatorily represent all employees in the relevant bargaining unit—members and nonmembers alike—in all phases of its statutory and contractual responsibilities, ranging from the negotiation of a collective bargaining agreement to the processing of an individual employee's grievance.

But the significance of the fair representation doctrine extends beyond the employee-union relationship. In suits brought by an employee against his employer under § 301(a) of the LMRA,[4] for a breach of the collective bargaining agreement, the employee must prove that the union breached its duty of fair representation in the handling of the grievance. Absent such a showing, the court may not entertain the breach of contract action. For practical purposes, it is in the context of § 301 suits that the duty is most significant.

Defining the nature and scope of the fair representation duty has proved to be a formidable task for the courts as well as the National Labor Relations Board (Board) because of the breadth of management-employee relations implicated. Determining whether a union's conduct amounts to "unfair representation" varies with the nature of the union's actions and the respective interests which are present. While courts have made every effort to do so, they have been unsuccessful in setting forth a single, workable standard that provides guidance to unions and employers alike in determining what is "unfair representa-

1. Section 9(a) of the Act, 29 U.S.C. § 159(a) (1976), establishes the union as the exclusive bargaining representative for unit employees. It provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

2. The individual freedom of contract is lost under the Act. An employer is prohibited from bypassing or disregarding the exclusive bargaining representative by negotiating directly with individual employees. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

3. *See infra* text accompanying notes 5-14.

4. Section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1976), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

tion." Instead, only vague, generalized standards have been announced which provide little meaningful guidance or assistance in defining the duty's contours. The lack of specific standards has generated serious problems. The most disconcerting is the marked and steady increase in the number of § 301 suits brought by disgruntled and dissatisfied employees in state and federal courts. As greater numbers of employees turn to the courts to resolve workplace disputes, grievance procedures contained in collective bargaining agreements assume less importance. As a result, the fundamental objective of federal labor laws—the private resolution of labor disputes—is seriously threatened.

The duty of fair representation must, therefore, balance the interest of an aggrieved employee who seeks redress for the alleged wrongs inflicted upon him against the interest of all parties in resolving labor disputes outside the judicial forum by agreed upon procedures. This statement represents sound theory but offers scant practical guidance in determining whether a union has breached its duty. Indeed, the single most important problem underlying the fair representation doctrine is the courts' failure to transform theory into definitive standards.

Supreme Court Developments

In 1967, the Supreme Court rendered a decision which remains the benchmark of all fair representation analysis. In *Vaca v. Sipes*,[5] a discharged employee brought suit alleging a breach by the union of its fair representation duty by refusing to submit his grievance to arbitration. Justice White announced the standard which continues to govern today:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[6]

With respect to the processing of a grievance, Justice White declared:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee had an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[7]

In refusing to create an absolute right to have a grievance submitted to arbitration, the majority reasoned that the efficiency and effectiveness of the grievance procedure would be seriously impaired and

5. 386 U.S. 171 (1967).
6. *Id.* at 190.
7. *Id.* at 191.

undermined if a union were not allowed to exercise its good faith and reasoned judgment regarding the overall merits and interests of a grievance. The union must be able to exercise selectivity in the processing of grievances for the collective bargaining process to flourish. Justice White did, however, add the following limitation on the union's exercise of selectivity:

> In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances.[8]

Albeit slightly more complicated, an employee discharge was also the subject of the Court's next major fair representation decision in *Motor Coach Employees v. Lockridge*.[9] The case was decided on preemption grounds but, in significant dicta, Justice Harlan provided insight into the Court's view of fair representation. Under the facts of the case, the employee was discharged after the union unintentionally erred in representing to the employer that the employee was in sufficient arrears with respect to union dues to warrant discharge under the collective bargaining agreement. The employee proceeded only against the union under the fair representation doctrine. The standard applied by Justice Harlan was drawn from *Vaca* and the earlier case of *Humphrey v. Moore*[10]:

> For [a breach of the duty of fair representation] claim to be made out, [the employee] must have proved "arbitrary or bad-faith conduct on the part of the Union." [cite omitted]. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." [cite omitted].[11]

He added the following important analysis:

> And the fact that *the doctrine* was originally developed and applied by courts, after passage of the Act, and *carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight*. . . . If, however, the congressional policies *Garmon* seeks to promote are not to be swallowed up, *the very distinction*, embedded within the instant lawsuit itself, *between honest, mistaken conduct on the one hand, and deliberate and severely hostile and irrational treatment, on the other,*

8. *Id.* at 194. Specific application of this standard, or lack thereof, can be found in Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981) and Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978).

9. 403 U.S. 274 (1971).

10. 375 U.S. 335 (1964).

11. 403 U.S. at 299.

needs strictly to be maintained.[12]

The language in the above quoted passage suggests a much more stringent standard than set forth in either *Vaca* or *Humphrey*. It is a heavy burden for an employee to overcome to show "intentional or severe" or "deliberate and severely hostile and irrational" treatment by the union in order to proceed with his § 301 action. An observer can only conclude that the Court's position on the fair representation standard is quite clear; the standard is an exceptionally high and enormously difficult one to satisfy.

The last major Supreme Court decision examining the fair representation duty is *Hines v. Anchor Motor Freight*.[13] A discharged employee brought suit alleging that the union failed to adequately investigate the truth of the employer's charges. Interestingly, the Court failed to even cite *Lockridge*, its most recent pronouncement on the fair representation duty. Instead, it reaffirmed the standard enunciated in *Vaca* with respect to the processing and administration of grievances.[14] The question which is raised is whether *Hines* represents an implied reversal of the "fraud and deceit" language found in *Lockridge* and *Humphrey*. Furthermore, under the "arbitrary" standard in *Vaca*, must an employee establish intentional wrongful conduct by the union in order to proceed with a § 301 suit or is negligence sufficient? Where is the meaningful line to be drawn between mere laxity in performance and redressable unfair representation? These and other issues surrounding the fair representation duty have been the subjects of considerable analysis by the Seventh Circuit.

Past Seventh Circuit Developments

It was not until 1975, some eight years after *Vaca*, when the Seventh Circuit first critically analyzed the fair representation doctrine in *Cannon v. Consolidated Freightways Corp.*[15] A discharged employee alleged in a § 301 suit that the union had breached its duty by failing to raise a defense during the grievance procedure. Decided before *Hines*, the court was required to apply the strict standard of *Lockridge*: "[T]he plaintiff must show that the union's conduct was intentional, invidious and directed at that particular employee."[16] Characterizing the union's failure to raise the defense as "an act of neglect or the product of a

12. *Id.* at 301 (emphasis supplied).
13. 424 U.S. 554 (1976).
14. *Id.* at 568-69.
15. 524 F.2d 290 (7th Cir. 1975).
16. *Id.* at 293.

mistake in judgment,"[17] the court held there was no breach. Quoting from a Third Circuit decision, it then importantly concluded that "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation."[18]

Three years later, in *Baldini v. Local 1095, UAW*,[19] the court clarified the standard to be applied.[20] In that case, the union had failed to perform a ministerial duty with respect to the processing of a discharged employee's grievance while telling the employee the act had been performed. The district court awarded summary judgment in favor of both the union and company. After affirming the judgment in favor of the union on exhaustion of intraunion remedy grounds, the Seventh Circuit reversed in regard to the company, reasoning that the union may have possessed no legitimate reason for failing to process the grievance. Consequently, summary judgment was inappropriate in the absence of a record explaining why the union had acted as it did. More importantly, the court went on to state that "*Vaca* expressly rejected an argument that only obvious breaches such as discrimination or hostile treatment would be actionable."[21] Then, squarely meeting the conflict between *Lockridge* and *Hines*, the court stated in the accompanying footnote:

> Occasional sentences lifted from their context might make it seem that invidious hostility or some sort of malice is always required, *see, e.g.*, *Motor Coach Employees v. Lockridge* . . . but the treatment of the issue in *Hines v. Anchor Motor Freight, Inc.*, *supra*, leaves little doubt that such has not become the law. Nor do we think a fair reading of *Lockridge* . . . really supports its arguments.[22]

Baldini thus established the principle that the proper analysis for fair representation cases is under *Vaca* and *Hines*. Something less than intentional wrongful conduct but more than simple negligence is required.

The conclusion of the *Baldini* court was reaffirmed in *Miller v.*

17. *Id.* at 294.

18. *Id.*, *quoting* Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970). Other circuits have reached the same conclusion. *See* Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982); Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981); Findley v. Jones Motor Freight, 639 F.2d 953 (3d Cir. 1981); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980); NLRB v. American Postal Workers Union, 618 F.2d 1249 (8th Cir. 1980); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978); Coe v. United Rubber Workers, 571 F.2d 1349 (5th Cir. 1978).

19. 581 F.2d 145 (7th Cir. 1878).

20. In two interim cases, the court applied different Supreme Court decisions as controlling authority. *See* Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977) (applying *Hines*); Dwyer v. Climatrol, 544 F.2d 307 (7th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) (applying *Lockridge*).

21. 581 F.2d at 150 (footnote omitted).

22. *Id.* at 150 n.5.

Gateway Transportation Co.[23] A suspended employee alleged there that the union did not properly represent him during the grievance process. The court made quite clear that *Lockridge* was nothing more than an unnecessary aberration in the Supreme Court's treatment of the fair representation doctrine. It rejected the *Lockridge* standard and reaffirmed the principle that intentional union misconduct is not required.

One of the important aspects of *Miller*, in addition to its rejection of an intent standard, is that it reaffirmed the fundamental maxim that the specific elements of the duty vary with the nature of the union and employee's interests.[24] Where a discharge is involved, the union's participation assumes "special importance" because of the seriousness of the interests at stake. Therefore, where the interests at stake are of lesser importance, such as a suspension or reprimand, the union will not be held to that same high level and quality of conduct. A "sliding scale" is in effect created which must be applied to the specific facts before the court.

Recent Seventh Circuit Developments—1981-82

In *Baker v. Amsted Industries, Inc.*,[25] several disgruntled employees filed a § 301 suit alleging that their union breached its fair representation duty by electing not to pursue to arbitration, and instead filing action in federal court, a dispute concerning the pension obligations of their employer and the purchaser of the employer's operations. In his opinion for the court, Judge Cudahy reviews the fair representation duty from a theoretical basis in support of the court's decision that the union had not acted improperly.

The significance of the opinion is that it explicitly acknowledges "the difficulty of stating a single rule that will provide an appropriate standard of decision in every case."[26] Judge Cudahy explains that the proper analysis will involve the consideration of "each claim in light of the interests it implicates. . . ."[27] Much of the opinion, therefore, is

23. 616 F.2d 272 (7th Cir. 1980).
24. *Id.* at 277, and n.11.
25. 656 F.2d 1245 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 2011 (1982).
26. 656 F.2d at 1252.
27. *Id.* Judge Cudahy then explained:

> Thus, in deciding whether and to what extent a particular grievance should be pursued, the Union must be allowed the discretion to balance many considerations and interests, including the effect of various resolutions of the grievance on other employees, the requirements of group organization and coherence, the desire for consistent treatment of similar claims, the appropriate allocation of limited resources for pursuing both individual and group claims, the maintenance of the Union's bargaining power and the necessity of maintaining an effective continuing relationship with the employer.

devoted to identifying the "diverse and divergent"[28] policy interests behind the duty of fair representation and its necessary role in collective bargaining under federal labor laws.

Three interests were highlighted. The first is that the collective interests of employees necessarily take precedence over the interest of the individual employee. A second is that "the fair representation doctrine must be limited to avoid inappropriate interference with the [Board's] exclusive jurisdiction over unfair labor practices."[29] The court did not elaborate on this factor, citing instead language from *Vaca* and *Lockridge*.[30] The third policy interest concerns the employer and the ability of a § 301 suit to reopen or reactivate an otherwise final and binding arbitration award. The court stated: "The integrity of such private settlement procedures, which are central to our system of industrial relations, might be undermined if the fair representation doctrine is too broadly or freely applied. . . ."[31]

The court encountered little difficulty in applying and balancing these policy interests to the case before it and concluding that no breach took place. The critical factor for the court was that the union was acting in its capacity as representative of all members of the bargaining unit.[32] The interests of all employees were implicated and the union was exercising its good faith and best reasoned judgment how to protect those interests. It was a question of strategy. Against whom should the claim be pursued and in which forum, arbitration or federal court? The union selected the latter and as the court concluded, "[e]ven if the Union's litigation strategy were subsequently determined to be misconceived, it would be excessively intrusive into Union decision-making for the courts to decide, in the absence of bad faith or egregious conduct, whether the Union has pursued the tactics most appropriate to the aggrieved employees' needs."[33]

The factual circumstances in *Hoffman v. Lonza, Inc.*,[34] were more familiar than those in *Baker*. In *Hoffman*, the union "forgot" to give the written appeal required under the collective bargaining agreement with respect to a discharged employee's grievance. The issue was

Id. at 1250.

28. *Id.* at 1249.

29. *Id.* at 1250.

30. *Id.* at n.10.

31. *Id.* at 1251.

32. "[T]he decision challenged in this case obviously implicates substantial interests of the Union in its capacity as representative of the entire bargaining unit." *Id.* at 1252.

33. *Id.*

34. 658 F.2d 519 (7th Cir. 1981).

whether this "negligent" conduct constituted a breach of the union's duty of fair representation. The court, in a majority opinion by Judge John Peck of the Sixth Circuit, sitting by special designation, held that it did not.

The employee argued that the union was at least required to evaluate his claim before deciding to abandon it.[35] A strikingly similar factual situation existed in a decision from the Sixth Circuit in *Ruzicka v. General Motors Corp.*,[36] wherein that court held simple negligence to not be enough. Judge Peck interpreted *Ruzicka* as requiring conduct "intended to harm" the employee or conduct reflecting a "reckless disregard for the rights of the individual employee."[37] He also believed that none of the reasoning or language in *Miller* and *Baldini*, despite footnote 5 in *Baldini*, indicated that the Seventh Circuit viewed *Vaca's* "arbitrary" standard as anything less than intentional wrongdoing. Additional support for the new standard was found in *Lockridge*.

In addition to his interpretation of judicial authority, Judge Peck relied upon two policy reasons. First, he believed that an intent requirement was necessary to protect the employer's interest in the finality of the grievance procedure. More specifically, the manipulatibility of the suit and the lack of incentive for the union to vigorously contest its alleged misconduct were ever present dangers under a lesser standard.[38] Secondly, he was concerned with the need to "limit the situations in which an employee may judicially contest the results of grievance and arbitration proceedings that are the subject of collective bargaining and properly within the jurisdiction of the National Labor Relations Board rather than the jurisdiction of the courts."[39] Based

35. *See supra* text accompanying note 8.

36. 649 F.2d 1207 (6th Cir. 1981). In *Ruzicka*, the union official also negligently failed to timely file a grievance statement. The court held that such conduct did not amount to "arbitrariness" because the union's action was due to its reliance on the employer's prevailing practice of freely granting extensions of time. As Judge Cudahy notes in his concurring opinion in *Hoffman*, had the union not relied upon that past practice, it is likely that a breach of the fair representation duty would have been found. 658 F.2d at 525 n.5 (Cudahy, J., concurring).

37. 658 F.2d at 521, *citing* Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981).

38. Judge Peck reasoned as follows:

> At least insofar as an employee seeks reinstatement and back pay, the union defendant of a suit for "unfair representation" may have little reason to vigorously contest the issue of alleged union wrongdoing. To permit an employee to recover because his union "forgot" to follow required grievance procedures would create an unacceptably high risk of collusion between union and employee, both of whom may share the same ultimate goal of reinstatement of the employee. By permitting actions for failure to fairly represent only where the employee can show intentional, invidious misconduct by the union, the possibility of collusive suits is minimized.

Id. at 522.

39. *Id.* The same policy consideration was highlighted by Judge Cudahy in *Baker*. *See supra* text accompanying note 29.

upon these considerations, Judge Peck, joined by Judge Bauer, concluded that an action for failure to fairly represent cannot be based solely on an allegation that a union unintentionally failed to file a notice that would permit a grievance to proceed to arbitration.

While agreeing that the union's conduct did not amount to a breach of its duty, Judge Cudahy, in a concurring opinion,[40] strongly disagreed with Judge Peck's adoption of an intent standard and disputed his interpretation of *Lockridge*, *Baldini* and *Miller*. Judge Cudahy's position is that the "arbitrary" standard is not limited solely to intentional conduct and that an intent standard effectively renders meaningless the inclusion of "arbitrary" by the Supreme Court in *Vaca*. He agrees that negligence is not enough but contends that something less than intent is; he adopts an "egregiousness" standard which would focus upon whether the union's conduct was "within the range of acceptable performance by a collective-bargaining agent."[41] In his view, such a standard best protects "the employer's interest in being able to rely on the finality of the grievance procedure."[42]

One of the significant aspects of *Hoffman* is Judges Peck and Cudahy's strong disagreement on controlling Supreme Court authority. Judge Cudahy charged that the majority's reliance on *Lockridge* was misplaced and that *Hines* established that arbitrary conduct need not be equated with intentional conduct.[43] Judge Peck strongly disagreed.[44] The relationship and conflict between *Hines* and *Lockridge*, seemingly resolved in *Miller* and *Baldini*, is now revived.[45]

The sharp division of the panel in *Hoffman* presented serious problems for the court in two subsequent decisions. In *Rupe v. Spector Freight Systems, Inc.*,[46] a complicated set of facts revolved around the employment status of an employee and whether the employer could discharge him without cause under the collective bargaining agreement. The union interpreted the contract as giving the employer that

40. *Id.* at 523-25 (Cudahy, J., concurring).

41. *Id.* at 524-25 n.4, (in which the court approved of and quoted from the concurring opinion of Judge Kennedy in Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978)).

42. 658 F.2d at 525.

43. *Id.* at 523-24.

44. *Id.* at 522 n.2.

45. *Hoffman* was Judge Cudahy's first opinion on the duty of fair representation since *Baker* was decided just ten days earlier, a decision he authored. It is interesting to examine his incorporation of *Baker's* principles into *Hoffman* inasmuch as their factual circumstances differ quite markedly. In *Baker*, Judge Cudahy stressed that each case will have to be examined individually and the laying down of hard rules will be extremely difficult. With the adoption of an intent standard, Judge Peck may have removed a significant portion of that difficulty, at least with respect to the processing of grievances.

46. 679 F.2d 685 (7th Cir. 1982).

right. The important aspect of the opinion in *Rupe* is the manner in which the court, speaking only through Judge Eschbach, avoids the intentional misconduct standard of *Hoffman*. Stating that the court need not decide whether a gross lack of diligence would violate the fair representation duty, he impliedly approves of the "egregiousness" standard favorably discussed by Judge Cudahy in his concurring opinion in *Hoffman*.[47] The complete avoidance of the *Hoffman* standard, a point well brought out by Judge Peck, again sitting by special designation,[48] is an astonishing example of judicial disregard of recent precedent.

The confusion left by *Rupe* was not resolved in the final fair representation case decided just eleven days later. In *Cote v. Eagle Store, Inc.*,[49] an employee was discharged for allegedly stealing two cartons of cigarettes. Heeding its counsel's advice, the union decided not to pursue the grievance to arbitration. In her § 301 suit, the employee charged that the union failed to diligently represent her by failing to personally interview her or to conduct an independent investigation into the incident which triggered the discharge.

The court's analysis of the applicable legal standards raises further questions concerning the prevailing law in this circuit. The court begins by citing *Hoffman* as the "circuit's most recent statement on what constitutes breach of the duty of fair representation."[50] This statement is simply incorrect. The misstatement can, however, be explained by the fact that *Rupe* was such a recent decision. It is likely that *Cote* was circulated and approved prior to *Rupe* being decided. Nonetheless, unlike *Rupe*, *Cote* expressly acknowledges the *Hoffman* standard that a union commits a breach only if it acts in a "deliberate and severely hostile irrational" manner.[51] It is interesting to speculate how two cases, decided within a period of less than two weeks, could reach opposite conclusions about what a case articulated as the governing legal standard. Moreover, the *Cote* court approvingly quoted, as did Judge Peck in *Hoffman*, the stringent standard announced in *Lockridge*.

Having applied the *Hoffman* standard and concluding that the

47. *Id.* at 691-92.

48. Judge Peck responded with the following:

> Consequently, I am of the view that the majority's statement that "we need not decide whether a gross lack of diligence, without more, would violate the duty of fair representation," is inappropriate. That question has already been answered, and, I find it unnecessary to consider whether Rupe presented evidence of gross negligence by the union in handling his grievance.

Id. at 696 (Peck, J., concurring).

49. 688 F.2d 32 (7th Cir. 1982).

50. *Id.* at 34.

51. *Id.*

union's conduct fell short of that level of conduct, the court seemingly leaves no doubt that *Hoffman* is controlling. But in its final paragraph the court states:

> The *Baldini* standard is less stringent than the *Hoffman* standard. Therefore, having found no breach of the duty of fair representation under the *Baldini* test, there can be no breach under *Hoffman*. The district court was correct in finding that the evidence failed to establish any breach of the duty of fair representation.[52]

The obvious purpose of this paragraph was to make clear to the employee that her case lacked merit even if the less stringent *Baldini* standard were applied rather than *Hoffman*. However, in light of the confusion generated by *Rupe*, the paragraph does nothing but fuel additional confusion and raise further questions concerning the circuit's adherence to the *Hoffman* standard.

Despite four efforts to articulate a single standard governing the duty of fair representation, the court failed to provide any clearer understanding into an already murky area of federal labor law. A legitimate question which must be asked is what standard governs? *Baker* concludes that no single standard can be appropriately applied to all cases. In the very next case, however, Judge Peck concludes in *Hoffman* that an intentional misconduct standard governs. Then, in *Rupe*, Judge Eschbach seemingly retreats from the *Hoffman* standard. And in *Cote*, *Hoffman* is reaffirmed but with a slight injection of *Baldini*. These four decisions give a new meaning to the doctrine of *stare decisis*.

What becomes painfully clear is that the court, as a unified voice, must resolve the confusion surrounding the duty of fair representation.[53] A single and workable standard, if possible, needs to be announced which will provide desperately needed practical guidance to trial judges and practitioners alike.

The remainder of this article will review the balance of the past term's decisions. The opinions can be generally divided into those

52. *Id.* at 35.

53. The following law review articles provide thoughtful analysis of the fair representation doctrine: Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, U. ILL. L.F. 35 (1979); Morgan, *Fair is Foul and Foul is Fair*—Ruzicka *& the Duty of Fair Representation in the Circuit Courts*, 11 U. TOL. L. REV. 335 (1980); Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 515 (1974); Note, *The Duty of Fair Representation in Grievance Administration: A Specific Test Modeled on Judge Bazelon's Dissent in United States v. DeCoster*, 39 WASH. & LEE L. REV. 185 (1982); Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence*, 65 CORNELL L. REV. 634 (1980); Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Collective Bargaining Agreement*, 125 U. PA. L. REV. 1310 (1977). *See also* articles cited in A. COX, D. BOK & R. GORMAN, LABOR LAW-CASES AND MATERIALS, 994 n.1 (9th ed. 1981).

dealing with labor law and those dealing with employment law. Further groupings will be made within these general divisions for the convenience of the reader.

REVIEW OF 1981-82 TERM LABOR LAW DECISIONS[54]

Employer Communications

What an employer may or may not say to its employees during an organizational campaign is a frequent subject in practically every term of the court and 1981-82 is no exception. Several of the decisions are worthy of discussion.

Perhaps the most analytically interesting case is *NLRB v. Coca-*

54. In Justak Bros. & Co. v. NLRB, 664 F.2d 1074 (7th Cir. 1981) and NLRB v. Berger Transfer & Storage Co., 678 F.2d 679 (7th Cir. 1982), the court implicitly reaffirmed its decision in Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981), approving the Board's "dual motive" test announced in Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), *cert. denied*, 102 S. Ct. 1612 (1982). *See also* NLRB v. Town & Country LP Gas Serv. Co., 687 F.2d 187 (7th Cir. 1982). Recently, however, in NLRB v. Webb Ford, Inc., 689 F.2d 733 (7th Cir. 1982), the court reversed itself and rejected *Wright Line*, instead adopting the Third Circuit's allocation of proof set forth in NLRB v. Behring Int'l, Inc., 675 F.2d 83 (3d Cir. 1982). The current conflict among the circuits, *see* Zurn Indus., Inc. v. NLRB, 680 F.2d 683, 687-88 n.8 (9th Cir. 1982), will be resolved by the Supreme Court which has granted certiorari in NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982) *cert granted*, 103 S. Ct. 372 (1982). A similar issue will be addressed by the Court in the context of public employees and their exercise of first amendment rights. Myers v. Connick, 507 F. Supp. 752 (E.D. La. 1981), *aff'd without opinion*, 654 F.2d 719 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1629 (1982).

Other labor decisions decided this past term but not discussed in the text are the following: Advertiser's Mfg. Co. v. NLRB, 677 F.2d 544 (7th Cir. 1982) (union official's statement that if "at any time" the employees become dissatisfied with the union, they could "vote it out just like they voted it in" not a misrepresentation. *But see* Midland Nat'l Life Ins. Co., 263 N.L.R.B. No. 24 (1982), wherein the Board held that misleading campaign statements regarding Board actions will no longer be grounds for setting aside representation election results); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679 (7th Cir. 1982) ("warehouse foreman" not a supervisor); NLRB v. Gold Standard Enter., Inc., 679 F.2d 673 (7th Cir. 1982) (broad variety of violations too numerous to mention); Atlas Metal Parts Co. v. NLRB, 660 F.2d 304 (7th Cir. 1981) (employer did not bargain in bad faith by refusing to compromise on 2 of 36 proposals; employer under no obligation to furnish information on its subcontracting activities); NLRB v. Colony Printing & Labeling, Inc., 651 F.2d 502 (7th Cir. 1981) (letter sent by employer to employees violative of § 8(a)(1)); NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613 (7th Cir. 1981) (employer's statement that he "couldn't afford to have a union in the place and pay discrimination wages; if he did, he'd have to close the doors" violative of NLRB v. Gissell Packing Co., 395 U.S. 575 (1969)); Caterpillar Tractor Co. v. NLRB, 658 F.2d 1242 (7th Cir. 1981) (employer engaged in bad faith bargaining by entering negotiations with an irreversible decision; discharge of two union officials valid under Indiana & Michigan Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979); Southern Ind. Gas & Elec. Co. v. NLRB, 657 F.2d 878 (7th Cir. 1981) (discussion of "supervisory employee" standards); Justak Bros. & Co. v. NLRB, 664 F.2d 1074 (7th Cir. 1981) (same); North Suburban Blood Center v. NLRB, 661 F.2d 632 (7th Cir. 1981) (standard for determining whether blood bank center a "health care institution" within the meaning of 29 U.S.C. § 152(14)); NLRB v. Keystone Steel & Wire, 653 F.2d 304 (7th Cir. 1981) (Board's remedial order conformed with mandate of court; relief can place employees in a better position than they would have been in had employer not committed the unfair labor practice).

Cola Company Foods Division,[55] the first labor decision authored by Judge Posner. The issue was what the court considered one of "first impression" regarding the power of the Board to prohibit interference with concerted activities before they materialize. The facts in the case are relatively simple. A demoted employee's grievance was denied by the plant manager. The employee then wrote a letter to the manager's superior which included some personal attacks against the manager in addition to the grievance. The manager learned of the letter and told the employee that "if any talk gets around out there on that floor about this grievance and what it pertains and this meeting, I'm coming after you."[56] The ALJ interpreted this remark as forbidding the employee from discussing his grievance with his fellow workers and as threatening retaliation if the employee did so. The NLRB affirmed, adding that the manager's statement restrained and coerced the employee in his right to discuss his grievance with other employees for the purpose of seeking their aid and support.[57] The court granted enforcement.

One of the fundamental rights possessed by employees under § 7 of the Act is the right to engage in concerted activities for the purpose of mutual aid and/or protection.[58] If the employee intended to enlist other workers in support of his grievance, he would have been engaged in a concerted activity protected by § 7.[59] There was no way to determine, however, whether the employee intended to do that because the manager's statement prevented anyone from answering that question. But the court held that "[a] right can be denied before its exercise is attempted or even contemplated."[60] Otherwise, outrageously unlawful employer conduct, occurring at the inception of organizational activity, would go unpunished "because no one could prove that concerted activity protected by section 7 would ever have taken place in the absence of the threat."[61]

In *W.W. Grainger, Inc. v. NLRB*,[62] the issue was whether the Board's finding that the employer had engaged in a coercive interrogation of an employee was supported by substantial evidence. The court

55. 670 F.2d 84 (7th Cir. 1982).

56. *Id.* at 85.

57. *Id.* The Board at first affirmed the ALJ's decision without any opinion. Only later did it make the addition which, as will be seen, became crucial to the final outcome of the case.

58. Section 7 of the Act, 29 U.S.C. § 157 (1976), provides in relevant part that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

59. *See* Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980).

60. 670 F.2d at 86.

61. *Id.*

62. 677 F.2d 557 (7th Cir. 1982).

held that it was not but the importance of the decision lies with Judge Posner's analysis of the timing and circumstances under which an employer is required to tell an employee, at the outset of the questioning, the purpose of it and assure him that there will be no reprisals if he refuses to cooperate.[63] He stated that "[t]he time for the warnings is when the witness has indicated a disposition to cooperate or at least before he has ruled out cooperation."[64] If the employee refuses to cooperate, no warnings need to be given. The court was less helpful with respect to the circumstances which require the warnings be given. It acknowledged that "[t]here are cases where the . . . warnings make sense and others where they do not,"[65] but summarily concluded that the failure to give the warnings in this case was not coercive. No practical assistance was given in identifying the circumstances where the warnings "make sense."

In *NLRB v. Illinois Bell Telephone Co.*,[66] the court applied the *Weingarten* rule which permits employees to be assisted by a union representative of their choice during investigative interviews.[67] Two telephone operators were under suspicion for adjusting charges on calls. At the time of her interview, the employee requested that a union representative be present but none was available. She then requested that a former assistant union steward be permitted to assist her. Upon learning that she was not a current steward, the employer refused. The interview then proceeded with the employee ultimately admitting wrongdoing.

The court agreed with the Board that the employee had not waived her *Weingarten* rights because she was never informed that she

63. These warnings, the labor law counterpart of *Miranda* warnings, are referred to as the "Johnnie's Poultry" warnings, named after the Board's decision in *Johnnie's Poultry Co.*, 146 N.L.R.B. 770 (1964), *enf't denied on other grounds*, 344 F.2d 617 (8th Cir. 1965). They are designed to curb the inherent coercive impact of employer interrogation while at the same time allowing the employer access to needed information in advance of the hearing. *See also* A & R Transp., Inc. v. NLRB, 601 F.2d 311 (7th Cir. 1979).

64. 677 F.2d at 560.

65. *Id.*

66. 674 F.2d 618 (7th Cir. 1982).

67. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). In two recent decisions, the Board has extended the scope of *Weingarten*. *See* Materials Research Corp., 262 N.L.R.B. No. 122 (1982) (*Weingarten* applies to unrepresented workers as well as to workers represented by a union); Pacific Tel. & Tel. Co., 262 N.L.R.B. No. 122 (1982) (right to the presence of an advisor includes the right to be informed in advance of the subject matter of the interview). *But see* Northwest Eng'g Co., 265 N.L.R.B. No. 26 (1982) (*Weingarten* inapplicable to plantwide rules meeting). For recent analysis of the *Weingarten* rule, *see* Dobranski, *The Rights of Union Representation in Employer Interviews: A Post-Weingarten Analysis*, 26 ST. LOUIS U.L.J. 295 (1982) and Margolin, *Employee Right to Representation in Employer Interviews: Weingarten and Progeny*, 12 SETON HALL L. REV. 226 (1982).

could terminate or suspend the interview until a union representative could be present. There was also no evidence that the collective bargaining agreement contained any limitation upon the employee's freedom of choice in the selection of a representative. For these reasons, the court found the finding of no waiver well supported by the record.

No Distribution/No Solicitation Rules

While § 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," it has never been so broadly interpreted as to bar the employer from imposing reasonable time, place and manner restrictions on union distribution and solicitation activities. The union's need to communicate with and reach employees must be balanced with the employer's need to maintain security, protect property and ensure efficient operations.[68] Shop rules addressing union solicitation and distribution are the most common means utilized by employers to advance and protect these interests. The scope of such rules was addressed in two decisions.

In *NLRB v. Rich's Precision Foundry, Inc.*,[69] the employer's shop rule subjected employees to discipline for "distribution of any literature of [sic] soliciting or selling of any kind *during working hours*."[70] The Board concluded that the rule infringed on the employees' right to engage in union solicitation and distribution on their breaks and lunch time and thus was unlawfully broad. The court fully agreed, adding that in the absence of evidence that such a no distribution/no solicitation rule was narrowly enforced and the employees were informed of such enforcement, a "working hours" prohibition rule will be held to be unlawfully broad.[71]

In *NLRB v. General Thermodynamics, Inc.*,[72] the issue surrounding the shop rule took an unusual twist. Ten months after a union organizational campaign failed, the employer posted regulations prohibiting solicitation on company time and distribution on company premises.

68. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

69. 667 F.2d 613 (7th Cir. 1981).

70. *Id.* at 617 (emphasis supplied).

71. *Id.* at 622. In a footnote, the court noted that the Board has only recently reversed its previous position that a working time prohibition was not presumptively invalid. *Id.* at 621 n.3. *See* TRW Bearing Div. v. Anderson, 257 N.L.R.B. No. 47 (1981), *overruling* Essex Int'l, Inc., 211 N.L.R.B. 749 (1974). In Hammary Mfg. Corp., 265 N.L.R.B. No. 7 (1982), the Board reversed a previous position and now permits an annual United Way campaign as an exception to a no-solicitation rule.

72. 670 F.2d 719 (7th Cir. 1982).

Shortly thereafter, based upon its attorney's advice, the employer removed the posted material but made no direct effort to inform its employees that the rules had been rescinded.

The ALJ, not deciding whether the rules were unlawfully broad, found no violation for the reasons that the "rules were removed prior to their effective date, that they were never distributed and were never enforced . . . [and] never implemented. . . ."[73] The Board overturned this decision, holding that "the posting in itself was sufficient promulgation to constitute a violation [and that] there is no evidence that [the employer] made any effort to inform employees of this rescission. . . ."[74] On appeal, the employer did not seriously dispute the illegality of the rules but instead centered its arguments on the fact that the rules had never become effective.

The court was unpersuaded. In its view, the employer was asserting an overly technical analysis and ignoring the reasonably foreseeable effects of its conduct. While the employer knew the rules were only being promulgated and not yet effective, the employees may not have been aware of the rules' status or the significance of the difference, if any. Moreover, the employer made no effort to inform the employees that the rules had been rescinded. The dilemma which confronted the employees was explained by the court this way: "If nothing could prevent an employer from promulgating an overbroad no-solicitation and no-distribution rule and withdrawing it before it had technically taken effect, the employees would be left to acting at their peril because they would not be certain that the rules had no application."[75]

Granting of Economic Benefits By Employer During Organizational Campaign

There is perhaps no more basic principle in labor law than that an employer is prohibited from conferring benefits upon its employees to induce them not to join a union or to abandon union activity.[76] The simplicity of stating the principle is exceeded only by the difficulty and uncertainty in its application.

The court attempted to clear up some of the murkiness that engulfs this area of the law in *Simpson Electric Co. v. NLRB*,[77] the facts of which are vital to its understanding. The union had engaged in a victo-

73. *Id.* at 720.
74. *Id.* at 721.
75. *Id.* at 722.
76. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).
77. 654 F.2d 15 (7th Cir. 1981).

rious organizational campaign. The employer filed unfair labor practice charges, with the Board finding in its favor and ordering another election. On the same day that decision was announced, the employer announced increases in wages and other benefits to be effective in all of its plants, including nine others not involved with the organizational campaign or the election. The increases had all been planned and budgeted before the first election. Furthermore, the employer explained that the timing of the increases was also due in some part to its anticipation of an increase in the federal minimum wage and that increases at recurrent intervals had become its regular practice. Soon thereafter, the Board announced that the rerun election would be conducted in three weeks. Charges were filed by the union regarding the increases and the Board concluded that they were granted with an improper motive. In fact, the record revealed that the general increases were inconsequential.[78]

The first issue was the Board's conclusion that the employer should have refrained from giving an increase at all ten plants. The court found this option totally unfair. Employees at the other plants were mere bystanders who would be punished if the employer, acting with an abundance of caution, cancelled increases for everyone. On the other hand, granting the increases at the other plants but not at the plant experiencing the organizational drive would have likely triggered employee resentment because of the invidious discrimination. The court was also puzzled by the Board's selection of an election date less than one month following the alleged unlawful benefit increases. If the Board sincerely believed that the increases tainted the election, the court could not understand why the Board rescheduled the election so soon after the employer's actions.

Turning to the merits of the employer's action, the court identified the dilemma an employer frequently confronts if plans to increase the employee benefit package coincidentally become effective at the time of an election. The court was sensitive to this dilemma and the particularly unique problems created in this regard by inflation. It held that "a grant of benefits, according to a regular time pattern, not exceeding the rate of inflation, and without special propaganda, should be viewed as a neutral act, regardless of any mere time relation to an organizing campaign, as long as inflation continues."[79] Applying this standard,

78. The court stated: "It is not found that Simpson's employees felt overwhelmed by any unexpected shower of largesse." *Id.* at 16.

79. *Id.* at 18.

the court refused to find the employer's actions unlawful. In addition to finding all the criteria satisfied, the court emphasized that there was no way for the employer to know when the rerun election would be held at the time it announced the increases. Thus, it could not have acted with the intent to influence that election.

Deferral of vacation benefits was the subject of the court's attention in *NLRB v. General Time Corp.*[80] In that case, for twenty years the employer had scheduled a plant shutdown for the last two weeks in July. For many of those years, the collective bargaining agreement explicitly set forth that period as a union member's first two weeks of annual vacation accrued from the prior year but did not specify when the pay for that vacation period was to be received. Past practice, however, called for payment on the Friday before the Monday that vacation was scheduled to begin. The contract expired in June, 1979, and the union immediately struck. The employer engaged in its normal shutdown at the end of July but did not pay accrued vacation benefits to the union strikers while at the same time paying such benefits to all non-union employees and skilled craft unit employees represented by another union who did not cross the union's picket line. The union strikers did not receive their vacation benefits until a new contract was ratified in August, 1979. The Board found the employer to be in violation of §§ 8(a)(1) and (3).

The employer was guilty of an unfair labor practice unless it could show that its refusal to grant vacation pay was justified and motivated by legitimate objectives. The employer argued it was not required to distribute vacation pay because vacation pay was just another negotiable term in the contract and, in the absence of a contract, there could be no contract violation. While finding the argument "disingenuous," the court rejected it. The accrued vacation pay for each employee arose from the previous contract, not the one being negotiated. And past practice specified the date of distribution. The court made clear that it was coercive for the employer to condition the receipt of benefits which accrued under the old contract on ratification of the new contract. With this same reasoning, the court further concluded that the employer's action in singling out these employees was patently discriminatory.

Formation of the Collective Bargaining Agreement

In two cases this term, the court discussed the criteria to be applied

80. 650 F.2d 872 (7th Cir. 1981).

in determining whether an agreement has been reached during collective bargaining negotiations. By far, the more significant is *Capitol-Husting Company, Inc. v. NLRB*.[81]

The employer had formerly been a member of a multiemployer bargaining unit. Although the unit disbanded, remaining competitive with the others was of paramount importance during contract negotiations. During its negotiations the employer stated that it would agree to match any agreement the union could reach with its competitors. Although the union did not formally or expressly accept the offer, it did end negotiation efforts with the employer and concentrated upon reaching an agreement with any one of the employer's competitors. In the next several months, the union and employer met only twice. Both meetings were short and did not reach any substantive issues. Further, no mention was ever made of the employer's offer to match. The union was finally able to reach an agreement with one of the employer's competitors. It then called upon the employer to honor the commitment to match the agreement. The employer refused, contending that adopting the contract would be "economic suicide."[82] After further attempts to resolve the labor dispute proved fruitless, the employees struck. The ALJ, affirmed by the Board without comment, found that an agreement to match had been reached which the employer unlawfully failed to honor.

The court held that substantial evidence supported a finding that the union manifested an acceptance at that first meeting. The court believed that the manner in which the meeting concluded, the union's reasonable reliance on the employer's representations and the foreseeability by the employer of the union's actions all constituted the necessary substantial evidence. Perhaps the traditional rules of contract law would not have found an acceptance and agreement in these circumstances but a reasoned and flexible application of those rules, the standard to be applied, certainly supported in the court's view the finding of an agreement.

The court further held that a contract was reached even presuming, as the employer asserted, only an offer to match was made at the first meeting. It concluded that nothing occurred thereafter which would constitute an implied revocation. The employer argued that the absence of discussion regarding the offer to match at the two subse-

81. 671 F.2d 237 (7th Cir. 1982). The second negotiations case is Consolidated Coal v. NLRB, 669 F.2d 482 (7th Cir. 1982), discussed at length *infra* in the text accompanying notes 91-95.

82. 671 F.2d at 240.

quent meetings, and its offers to extend the existing contract for an additional year which were made, should have led the union to reasonably believe that the offer to match had been withdrawn. The court disagreed and relied upon an Eighth Circuit decision which held that an offer, once made, remains on the bargaining table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn.[83]

The flexibility in applying general principles of contract law demonstrated by the court in *Capitol-Husting* leaves labor negotiators in a slightly bewildering situation. But that same bewilderment existed prior to *Capitol-Husting* and perhaps to a greater degree. The law governing collective bargaining on this subject is conflicting and unhelpful. *Capitol-Husting* recognizes this problem and provides some assistance. No more can really be expected without the court incurring the risk of interfering with the "sanctity and integrity" of the bargaining process.[84] While employers will undoubtedly be more aware of the dangers associated with reliance on an implied revocation of an offer, unions must be equally concerned with the dangers associated with reliance on an implied or inferred acceptance. The tone of *Capitol-Husting* and the uniqueness of its facts indicate that unions will not often prevail under such a theory.

Meaning of Credibility Under Substantial Evidence Standard of Review

Section 10(e) of the Act sets forth the substantial evidence standard of review that courts must apply in reviewing the Board's findings of fact.[85] In the celebrated case of *Universal Camera Corp. v. NLRB*,[86] the Supreme Court announced the proper method of applying this

83. Pepsi-Cola Bottling Co. v. NLRB, 659 F.2d 87 (8th Cir. 1981). While approving the general standard announced in *Pepsi-Cola*, the court withheld opinion on the Eight Circuit's application of that standard in the context of a rejection. 671 F.2d at 244 n.5.

84. *Id.* at 245. The *Capitol-Husting* court was quite mindful of the dangers resulting from intrusion upon the private bargaining process. It stated:

> This court is keenly concerned with not unduly intruding upon the collective bargaining process and the right of parties to make their own agreements. Enforcing the Board's order under these circumstances protects, rather than interferes with, the sanctity and integrity of the bargaining process and in fact effectuates the federal policy of maintaining and promoting "industrial peace."

Id.

85. Section 10(e) of the act, 29 U.S.C. § 160(e) (1976), provides in pertinent part:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

86. 340 U.S. 474 (1951).

standard where the decision of the administrative law judge differs from the decision of the Board.

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. . . . *The significance of his report, of course, depends largely on the importance of credibility in the particular case*.[87]

Under the *Universal Camera* standard, the meaning of "credibility" assumes enormous importance within the judicial reviewing process. In *Kopack v. NLRB*,[88] the Seventh Circuit attempted to clarify the ambiguity surrounding the term "credibility" and narrow the range of meanings courts have assigned to it.

In *Kopack*, the Board concluded, in overruling the decision of the ALJ, that the dismissal of a father and son were not in retaliation for the son's complaints about a lack of overtime pay. The issue revolved around the extent to which the ALJ had relied upon "credibility" findings in support of his decision. The two dismissed employees argued that the ALJ's decision turned solely on "credibility" and that the Board's decision was not, therefore, supported by substantial evidence under *Universal Camera*.

The court recognized that credibility is at issue in practically every case, or at least in any case involving testimonial evidence. Whenever one side is found to prevail, the decision maker is inherently finding that side's arguments more persuasive or credible than the other's. But the court went on to declare that credibility has a much narrower meaning if it is interpreted as synonymous with witness demeanor. Relying on the analysis and conclusion of Judge Clifford Wallace in *Penasquitos Village, Inc. v. NLRB*,[89] the court concluded that "credibility," as used by the Court in *Universal Camera*, refers only to witness demeanor. Thus, to the extent that an ALJ's decision rests explicitly on his evaluation of witness demeanor, the court is required to "weigh those particular findings more heavily."[90] Applying this new meaning of "credibility" to the record before it, the court upheld the Board's decision on the ground that the ALJ's decision did not turn solely on

87. *Id.* at 496 (emphasis supplied).
88. 668 F.2d 946 (7th Cir. 1982), *cert. denied*, 102 S. Ct. 2278 (1982).
89. 565 F.2d 1074 (9th Cir. 1977).
90. 668 F.2d at 954.

witness demeanor but rather on inferences drawn from all of the evidence.

Just two weeks after deciding *Kopack*, the court had another opportunity to apply to its new meaning of credibility in *Consolidation Coal Co. v. NLRB*.[91] In that case, the union and employer entered into negotiations regarding an absenteeism policy. An agreement was reached subject to approval by the union membership. The membership demanded certain changes and, after another negotiating session, the employer consented to them. It agreed to type up the contract and the union committee would then come and sign it. The union, however, experienced doubts about the exact meaning of the negotiated clause. The chief union negotiator met with the chief employer negotiator on January 23 and a mutually acceptable understanding was reached. The union's negotiator testified that the employer's negotiator stated he would have the agreement typed and ready for signing by the union committee the next day. As scheduled, the union committee arrived the next day for the signing but the employer failed to show. Later, the employer's negotiator told the union's negotiator that the contract was unacceptable to his superiors. The employees then went out on strike contending that the employer reneged on the contract.

The ALJ had credited the testimony of the union's negotiator regarding the statements made at the conclusion of negotiations. Judge Pell, writing for the panel as he did in *Kopack*, found that this action was not a "credibility" determination because the ALJ's decision rested not on demeanor but on an analysis of the evidence.[92] While the ALJ based his conclusion on the entire record including his "observation of the witnesses," he never mentioned demeanor in comparing the testimony of the two negotiators. The court believed that such a general preliminary recitation "of a boilerplate nature" did not constitute a finding based on demeanor.[93] Thus, the court was essentially in as good a position as the ALJ and the Board in determining which witness more accurately recounted the statements made on January 23. Analyzing the testimony, the court found no "meeting of minds" had been reached and, therefore, the employer could not have violated § 8(a)(5) by not signing the contract.

After *Consolidation Coal*, credibility under the *Kopack* standard assumes an extremely narrow meaning. There were two versions of

91. 669 F.2d 482 (7th Cir. 1982).
92. *Id.* at 488.
93. *Id.*

what was said at the critical January 23 meeting. While the court emphasized that it was basing its decision on the union negotiator's version of statements made, it cannot be seriously disputed that the court, in the final analysis, elected to believe the employer's negotiator. No other conclusion can be fairly drawn from a plain reading of the opinion. The only justification given for this action was that the ALJ failed to expressly and specifically state that his decision was based on demeanor.[94] As a result, the court concluded that no part of the decision was based on demeanor and was subject therefore to more exacting judicial scrutiny. Whatever other significance this decision might have, it is seemingly clear that only a very limited portion of an ALJ's decision is now protected from judicial scrutiny under the *Universal Camera* cloak of "credibility."[95]

Board Misconduct

The NLRB generally possesses broad discretion in terms of establishing policies and rules towards effectuating the purposes of the federal labor laws. That discretion, however, is not unlimited. When the Board adopts a policy as guidance in the future exercise of its discretion, subsequent decisions must be reasonably consistent with that expressed policy. Where the Board decides to modify or depart from that established policy, it must explicitly announce the change and the reasons for it.[96] In *Consolidated Papers, Inc. v. NLRB*,[97] the court refreshed the Board's memory concerning the importance of this principle.

In *Consolidated Papers*, the collective bargaining agreement between the employer and the union defined the Wisconsin bargaining unit to include "hourly paid employees engaged in office and clerical work."[98] Several groups of employees were expressly excluded as were bargaining unit employees who performed work which was exempt

94. This appears to conflict with NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 687 (7th Cir. 1982), wherein the court stated that "explicit credibility findings are unnecessary when the ALJ implicitly resolves conflicts in testimony as evidence by findings of fact which are supported by the record as a whole."

95. In NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613 (7th Cir. 1981) and Justak Bros. & Co., Inc. v. NLRB, 664 F.2d 1074 (7th Cir. 1981), the court reaffirmed the general principle that absent exceptional circumstances, credibility determinations made by an ALJ ordinarily will not be disturbed on review. Both of these cases were handed down before *Kopack*. It would appear proper to now modify this principle to cover only "demeanor" determinations.

96. *See* Midwest Stock Exch., Inc. v. NLRB, 620 F.2d 629 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980). *See also* Worley Mills, Inc. v. NLRB, 685 F.2d 362 (10th Cir. 1982).

97. 670 F.2d 754 (7th Cir. 1982).

98. *Id.* at 756.

from the coverage of the Fair Labor Standards Act (FLSA). In mid-1979, six employees, salaried and exempt from FLSA coverage, were transferred from Chicago to the Wisconsin plant. The union filed a unit clarification petition pursuant to 29 U.S.C. § 159(b), seeking to include these six employees in the Wisconsin bargaining unit. Before the Board, the employer argued that a unit clarification petition could not be entertained midway during the term of the existing collective bargaining agreement because the transferred employees were excluded from the bargaining unit by the terms of the contract and historical practice. This argument was based upon the Board's policy announced in *Wallace-Murray Corp.*[99] The Regional Director and the Board failed to discuss or even mention the applicability of *Wallace-Murray*. Rather, each addressed the merits of the accretion question and concluded that the six employees shared a community of interest with the unit employees sufficient to justify an accretion. The employer refused to bargain with the union concerning these employees.

Writing for the court, Judge Cudahy did not reach the merits of the accretion issue. Rather, he focused on *Wallace-Murray* and, concluding that the rule retained full force and weight, whether it should apply. Finding the case similar to the decision in *Monongahela Power Co.*,[100] wherein the Board found *Wallace-Murray* applicable, the court held that the Regional Director should have dismissed the union's unit clarification petition. While refraining from scolding the Board for ignoring *Wallace-Murray* or for failing to articulate reasons why established precedent was not followed, the court made undeniably clear that the Board "remains obligated to apply its precedent with reasonable consistency."[101]

Wildcat Strikes—Duty of Union to Exhaust Grievance Procedures

Under what circumstances may a union ignore the grievance procedure contained in a collective bargaining agreement and immediately engage in a strike over a dispute which could conceivably be resolved by that grievance procedure? In two cases this term, the court limited the ability of a union to engage in such conduct.

In *Irvin H. Whitehouse & Sons Co. v. NLRB*,[102] several employees walked off their jobs claiming that they were being required to work in unsatisfactory conditions which OSHA later confirmed to be unsafe.

99. 192 N.L.R.B. 1090 (1971).
100. 198 N.L.R.B. 1183 (1972).
101. 670 F.2d at 758 n.6.
102. 659 F.2d 830 (7th Cir. 1981).

The employees were dismissed and replaced. The union later filed charges with the Board which held, in a 2-1 decision, that the employer had violated § 8(a)(1). The Board reasoned that the employer and union did not intend the contractual arbitration provision to extend to the contract's "Occupational Safety Clause," and that implication of a no-strike clause which would render the walkout unprotected was improper.[103] The court disagreed and denied enforcement.

The issue was whether the contractual arbitration provision extended to safety disputes, thereby creating a no-strike obligation as to such disputes. In *Local 174, Teamsters v. Lucas Flour Co.*[104] and *Gateway Coal Co. v. United Mine Workers*,[105] the Supreme Court examined this identical question and set forth the principles which govern the existence and scope of implied agreements not to strike. First, the contract must impose upon both parties the duty of submitting to final and binding arbitration. Second, the matter in dispute must be one which has been agreed will be covered by the compulsory terminal arbitration. The first of these requirements was undisputedly satisfied in *Whitehouse*. It was the second to which the court devoted its attention.

The agreement in *Whitehouse* granted the arbitration panel the broad authority to "adjust disputes and grievances that may arise" and "to interpret this agreement so as to give force and effect to the intent, purpose and meaning of this agreement."[106] While this arbitration provision was not as broad as that in *Gateway Coal*,[107] the court concluded that the inclusion of the Occupational Safety Clause, which provided that the parties "will cooperate in the prevention of accidents and in protection and promotion of the safety and health of employees,"[108] represented compelling evidence that the parties intended to arbitrate such disputes.[109]

In *Caterpillar Tractor Co. v. NLRB*,[110] the employees walked off their jobs in protest against the employer's unilateral change in job classification procedures. The Board and the court both found that the

103. *Id.* at 833.
104. 369 U.S. 95 (1962).
105. 414 U.S. 368 (1974).
106. 659 F.2d at 831.
107. The arbitration clause in *Gateway Coal* governed disputes "as to the meaning and application of the provisions of this agreement," disputes "about matters not specifically mentioned in this agreement," and "any local trouble of any kind aris[ing] at the mine." 414 U.S. at 375.
108. 659 F.2d at 832.
109. "The specific inclusion of such aims as one of the purposes of the contract is perhaps more compelling evidence of the parties' intent to arbitrate such disputes than is the sweeping, but more general language of *Gateway Coal*." *Id.* at 834.
110. 658 F.2d 1242 (7th Cir. 1981).

employer committed a § 8(a)(5) violation by failing to bargain over the change before implementation. The Board further concluded that the employee's wildcat strike was protected activity under the *Mastro Plastics* rationale.[111] That case has been interpreted by the Board to stand for the proposition that "only strikes in protest against serious unfair labor practices should be held immune from general 'no-strike' clauses,"[112] and that an unfair labor practice will be considered "serious" if it is "destructive of the foundation on which collective bargaining must rest."[113]

The pivotal issue in *Caterpillar* was whether the employer's § 8(a)(5) violation constituted a serious unfair labor practice. The court held that it did not, refusing to create a general rule that all § 8(a)(5) violations are to be considered "serious" for purposes of *Mastro Plastics* analysis. To do so would result in encouraging strikes where contractual means of resolution might be available and successful. It would also be inconsistent with the federal policy of promoting the private resolution of labor-management disputes. The court did not hold, however, that a § 8(a)(5) violation could never constitute a serious unfair labor practice. The opinion suggests that unlawfully motivated § 8(a)(5) violations may be considered serious.[114] However, where the refusal to bargain is precipitated by good faith reliance, even though erroneous, upon the management prerogative clause, it is unlikely that the court will characterize the refusal as serious for *Mastro Plastics* analysis.

Duties of Union Steward During Illegal Work Stoppage

The union steward plays a particularly important role in the enforcement and administration of a collective bargaining agreement. That role assumes added importance where the employees bypass the grievance procedures contained in the collective bargaining agreement and illegally engage in a work stoppage. What duties does the steward possess in preventing the stoppage and in working towards having the employees return? What can the employer expect of the steward in this regard? And what action may an employer take against the union

111. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). In that case, the Supreme Court held that absent clear evidence to the contrary, a no-strike clause in a collective bargaining agreement will be deemed to apply only to economic strikes. An unfair labor practice strike is protected activity.

112. Arlan's Dep't Store of Mich., Inc., 133 N.L.R.B. 802, 807 (1961), *quoted in* 658 F.2d at 1247.

113. 350 U.S. at 281, *quoted in* 658 F.2d at 1247.

114. 658 F.2d at 1248.

steward alone, and under what circumstances, after the work stoppage ends? These were questions previously addressed by the court in *Indiana & Michigan Electric Co. v. NLRB*.[115] During this term, the court had two opportunities to apply the standards enunciated there.

In *C.H. Heist Corp. v. NLRB*,[116] the employer posted seniority lists reclassifying and demoting some plant employees pursuant to its interpretation of a recently negotiated collective bargaining agreement. The employees challenged the propriety of this action and elected to walk out rather than pursue their objections through the grievance procedure. Prior to doing so, they consulted with their union steward who urged them not to strike. After the picket line was established, the steward refused to cross as the employer wanted him to do and reluctantly participated in the strike. He did, however, continue to urge the strikers to return to work and seek legal counsel. Upon the strike's conclusion, the only disciplinary action taken against any employee or union official was the dismissal of the steward. The Board found that the employer violated §§ 8(a)(1) and (3) by dismissing the steward solely on the basis of his status as a union steward.[117]

In *Indiana & Michigan Electric*, under very similar circumstances involving the suspension of three union officials, the court denied enforcement of the Board's order, reasoning that "[t]he more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file."[118] The collective bargaining agreement in *Heist* was interpreted by the court as even more general than the provisions in *Indiana & Michigan Electric*. In addition to a no-strike clause, the agreement provided that "[t]he steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with. . . ."[119] The employer argued that this provision imposed upon

115. 599 F.2d 227 (7th Cir. 1979). The Supreme Court has granted review in a case which focuses on the question of a union official's higher duty to uphold a no-strike provision in a collective bargaining agreement and the ability of an employer to selectively discipline union officials for failing to satisfy that duty. Metropolitian Edison Co. v. NLRB, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982). *See also* Miller Brewing Co. v. NLRB, 686 F.2d 962 (D.C. Cir. 1982) (union stewards cannot be subjected to greater discipline in the absence of a collective bargaining provision creating higher duties for union officials during work stoppages); Fournelle v. NLRB, 670 F.2d 331 (D.C. Cir. 1982) (selective discipline for stewards valid where permitted under the terms of a collective bargaining agreement); Consolidation Coal Co., 263 N.L.R.B. No. 188 (1982).

116. 657 F.2d 178 (7th Cir. 1981).

117. *Id.* at 181. The steward was the only one of 25 strikers disciplined.

118. 599 F.2d at 230.

119. 657 F.2d at 181.

the steward, in addition to his attempts to dissuade the employees from striking both before and after the strike, the obligation to cross the picket line once the strike commenced.

The court refused to construe *Indiana & Michigan Electric* so broadly. It held that in the absence of a clear contractual provision requiring the steward to cross the picket line, the efforts of the steward in this case were sufficient, if not the most effective possible, to satisfy his obligation to see that the no-strike clause was complied with. Moreover, it agreed with the union that requiring crossing of the picket line "would have been suicidal to his union stewardship and his capacity to enforce any provision of the bargaining contract."[120] *Indiana & Michigan Electric* was distinguished on the basis that the union officials' efforts to end the strike there were not as aggressive as the efforts of the steward in *Heist* and were done belatedly.

Contrary to the court's assertions, the contractual language in *Heist* is more specific than the language in *Indiana & Michigan Electric* regarding the obligations of a union steward in the event of a strike. Therefore, its attempt to distinguish *Heist* on this basis is unpersuasive.[121] The pivotal consideration is what can realistically be expected of a union steward, carefully keeping in mind the realities of a steward's power and the impact upon his relationship with his union members, if crossing a picket line is construed as an implied requirement of a contractual clause similiar to the one in question. Recognizing the "suicidal" effects of such a requirement, the court correctly held that if the employer desires actions by the steward which would involve more than active discouragement of the strike, the employer must seek express inclusion of such a provision in the contract. An obvious outgrowth of *Heist* will be a greater concentration by bargaining parties over the exact duties and obligations assumed and owed by stewards and other union officials in the event of an illegal work stoppage. If the duties and obligations are not expressly spelled out, employers should not be surprised to find the court very unwilling to impose as a requirement anything more than vocal dissuasion.[122]

120. *Id.* at 183.

121. In *Heist*, the court concluded that "[t]he contractual basis for the union steward's 'higher responsibility' in this case is even more tenuous than in *Indiana & Michigan Electric Co.*" *Id.* at 182. While just as generally worded as the clause in *Indiana & Michigan Electric*, *see* 599 F.2d at 228, the clause in *Heist* defining the steward's responsibilities is plainly more specific. *See supra* text accompanying note 119. At minimum, the differences between the two provisions are legally insignificant.

122. The second union steward case applying the *Indiana & Michigan Elec.* standard is Caterpiller Tractor Co. v. NLRB, 658 F.2d 1242 (7th Cir. 1981). With just a brief discussion, the court found that the discharge of two union officials was provoked by their failure to satisfy their

Rights and Status of Strikers

Over the years the Board, with judicial approval,[123] has distinguished the rights strikers enjoy and the responsive actions an employer may take against them based upon whether the strike is in response to an employer's unfair labor practice or whether it is for other reasons, typically in support of bargaining demands. The participants in the former are labeled unfair labor practice strikers and the latter economic strikers.

In *Atlas Metal Parts Co., Inc. v. NLRB*,[124] the court described the most important difference between the two. An unfair labor practice striker is entitled to immediate and unconditional reinstatement to his former job at the conclusion of the strike, even if the employer has hired a replacement. If the job itself has been abolished, the employer must offer a substantially equivalent position. In contrast, an economic striker has no such job security. The employer is obligated to make an unconditional offer to return to work, but only to meet its legitimate staffing requirements. The economic striker has no right to displace a permanent replacement nor is he entitled to a substantially equivalent position. The risks of walking out for the economic striker are thus much greater than those for an unfair labor practice striker.

The two cases decided this term involving the rights and status of strikers are *Capitol-Husting Company, Inc. v. NLRB*[125] and *Giddings & Lewis, Inc. v. NLRB*.[126] In *Capitol-Husting*, employees walked off their jobs to protest the employer's failure to match the terms of another collective bargaining agreement which the employer had earlier agreed to match.[127] The employer hired replacements and offered them health and pension benefits different from those provided for in the expired contract. Several of the strikers decided to return to work and the employer permitted them to do so. However, the employer changed their

greater responsibility towards ending the strike. Little information is contained in the opinion, however, concerning their actions before and during the strike as well as the applicable contractual provisions. As a result, the decision is of little value with respect to gaining a better understanding of *Indiana & Michigan Elec*.

123. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). In its 1982-83 term, the Supreme Court will address an issue involving the rights of permanent replacements. The issue is one of jurisdiction: whether a state court has the power to assume jurisdiction over employment rights of strike replacements or whether the determination of such rights are subject to the exclusive jurisdiction of the Board. Belknap, Inc. v. Hale, 622 S.W.2d 918 (Ky. App. 1981), *cert. granted*, 102 S. Ct. 2956 (1982).

124. 660 F.2d 304, 310 (7th Cir. 1981).

125. 671 F.2d 237 (7th Cir. 1982).

126. 675 F.2d 926 (7th Cir. 1982).

127. *See supra* text accompanying notes 81-84.

health and pension benefits to those being received by the replacements. The Board, without comment, adopted the ALJ's unexplained conclusion that the employer violated §§ 8(a)(1) and (5) by making these changes and the court agreed.

In *Keystone Steel & Wire v. NLRB*,[128] the court held in part that changes in health benefit programs constitute a mandatory subject of collective bargaining. An employer may not make changes in these areas without first negotiating with the union. This requirement, however, does not apply to benefits received by replacements of striking employees. In *Leveld Wholesale, Inc.*,[129] the Board adopted without comment the ALJ's reasoning that the interests of replacements are different from those of strikers and the union cannot be expected to effectively and fairly represent these inherently conflicting interests. In *Capitol-Husting*, the court considered the reinstatement and displacement rights to be crucial in concluding that the interests of returning strikers were more closely aligned with those of strikers than with those of replacements. Thus, the employer could not bypass the union and unilaterally change the health and pension benefits for the returning strikers.

It is important to note that the court limited its holding to returning unfair labor practice strikers.[130] The reason for this action is that reinstatement rights, the decisive factor underlying the decision, differ for economic strikers. The potential significance this difference possesses, if any, was left for another case.

In *Giddings & Lewis, Inc.*, the issue was whether unreinstated economic strikers have a right to be reinstated before laid-off permanent replacement workers with less seniority are recalled. The governing principle was expressed in *NLRB v. Mackay Radio & Telegraph Co.*,[131] wherein the Supreme Court granted employers the right to permanently replace striking employees in an effort to carry on its business. As previously discussed, the court further held that economic strikers are entitled to reinstatement only where vacancies arise or new jobs are created. Finding *Mackay* to be dispositive, the *Giddings* court reasoned that the employer's promulgation of the seniority rules was one way by which it could assure the replacements the permanency of their employment. In light of typical and expected fluctuations in work force levels and the probable necessity of at some point temporarily laying

128. 606 F.2d 171, 178-79 (7th Cir. 1979).
129. 218 N.L.R.B. 1350 (1975).
130. 671 F.2d at 248 n.7.
131. 304 U.S. 333 (1938).

off employees, the employer's action "assure[d] replacements the permanent status to which *Mackay* says they are entitled."[132] If replacements faced the loss of their jobs whenever a lay-off occurred, they could hardly be called "permanent replacements." Such a result "would eviscerate the *Mackay* rule."[133]

Bargaining Orders

In the landmark case of *NLRB v. Gissel Packing Co., Inc.*,[134] the Supreme Court specified two circumstances in which the remedy of a bargaining order is permissible in spite of the acknowledged preference for an election. The first is where the employer's conduct is so outrageous and pervasive as to effectively prevent the holding of a fair and reliable election at anytime in the future. The second includes cases where the employer's unfair labor practices are less than pervasive but which nevertheless have the tendency to undermine majority strength and impede the election processes.[135] In this latter category, an additional prerequisite is a demonstration, typically through the use of authorization cards, that the union had at one point achieved majority support. In several cases this term, the court examined a variety of problems encountered in the second category of bargaining orders.

In *Justak Brothers & Company, Inc. v. NLRB*,[136] the court first rejected several challenges to the validity of signed authorization cards. It then concluded that a bargaining order was justified because of the systematic nature of the employer's anti-union campaign, the participation of many supervisors, including that of a high corporate official, and the failure by the employer to make any effort to neutralize any of the coercive effects. The court also noted that the probable impact of

132. 675 F.2d at 930.

133. *Id.*

134. 395 U.S. 575 (1969).

135. In a recent decision, the Board reaffirmed the rule that a nonmajority bargaining order may be issued in exceptional cases where the employer's "outrageous" and "pervasive" unfair labor practices eliminate any reasoned possibility of holding a free and uncoerced election. Conair Corp., 261 N.L.R.B. No. 178 (1982). In *Conair*, dissenting Members Van de Water and Hunter strongly attacked this rule on the basic ground that it conflicts with the majority rule doctrine paramount in the Act. The majority relied heavily upon the Third Circuit decision in United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980), wherein the court affirmed the propriety of a Category I bargaining order, noting that "[a]lthough several commentators have observed that the court [in *Gissel*] did not specifically endorse the issuance of bargaining orders in the absence of a card majority, virtually every court that has discussed the issue has stated that a bargaining order may be issued in the absence of a card majority." *Id.* at 1066.

On the same day the *Conair* decision was announced, the Board also reaffirmed the general principles governing Category II cases. United Supermarkets, Inc., 261 N.L.R.B. No. 179 (1982).

136. 664 F.2d 1074 (7th Cir. 1981).

unfair labor practices is increased where the size of the bargaining unit is small.

In *Montgomery Ward & Co. v. NLRB*,[137] the court engaged in a lengthy analysis of whether two women were employees on the date of an election. The opinion centers upon the "reasonable expectation of employment" standard. The extensive discussion and application of the standard makes this case mandatory reading for any litigator confronting the same issue.

Perhaps the most important issue addressed by the court in the context of bargaining orders is the extent to which the Board is obligated to articulate its reasons for invoking the drastic sanction. In *NLRB v. Berger Transfer & Storage Co.*,[138] the unlawful actions of the employer were nearly identical to those present in *Justak Brothers*. Although the Board discussed in great detail the unfair labor practices and the lingering negative impact they had on the union's organizational efforts, it failed to examine and expressly discuss the adequacy and effectiveness of traditional remedies. In a recent decision, *Red Oaks Nursing Home, Inc. v. NLRB*,[139] the Seventh Circuit emphasized that the Board is required to make such "specific findings." But in *Red Oaks*, as well as in *Justak Brothers*, the court created an exception to this requirement where the reasons for the Board's issuance of a bargaining order, while not expressly stated, are nevertheless obvious from a clear record.[140] In *Berger Transfer*, as in *Justak Brothers*,[141] the record was sufficiently clear and obvious for the court to conclude that traditional remedies were inadequate. As a result, the Board was found to have acted within its discretion in issuing a bargaining order.

The NLRB and Undocumented Workers

One of the more important Seventh Circuit labor decisions in recent years in *NLRB v. Sure-Tan, Inc. (Sure-Tan I)*,[142] wherein the court held that undocumented alien workers are entitled to the protections of the Act. The parties in that case made a reappearance before the court this term seeking resolution of outstanding issues. Specifically, the issue was whether the employer violated § 8(a)(3) by reporting the illegal

137. 668 F.2d 291 (7th Cir. 1981).
138. 678 F.2d 679 (7th Cir. 1982).
139. 633 F.2d 503 (7th Cir. 1980), *reaffirming* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 (7th Cir. 1973).
140. 633 F.2d at 509.
141. The *Red Oaks* type exception was reaffirmed by the court in *Justak Brothers* in 664 F.2d at 1081 n.2.
142. 583 F.2d 355 (7th Cir. 1978).

status of its foreign employees to the Immigration and Naturalization Service (INS) following an election and certification of the union.[143]

In *Sure-Tan II*,[144] the employer had engaged in pervasive anti-union conduct prior to an election. On the day the Board gave it notice that the election result in favor of the union would stand, the employer sent a letter to the INS asking it to check the immigration status of five employees. The INS' investigation revealed that each was living and working illegally in the United States. Soon thereafter, all five voluntarily departed the country. Charges were subsequently filed, with the Board concluding that the employer constructively discharged the employees in violation of §§ 8(a)(1) and (3) by sending the letter.

The employer raised several arguments before the Board and court, one of the more important being that the letter to the INS did not amount to a constructive discharge. The employer contended that its action was legally protected and that it was the illegal status of the employees which caused their departure, not the letter. The court found these arguments completely without merit under the criteria for a constructive discharge[145] and had little difficulty in finding that the employer had acted with anti-union animus based on its flagrant violations of the Act as well as the proximity in time between the election and the letter.

Having found the discharges to be in violation of § 8(a)(3), the court engaged in the task of formulating a remedy. The interesting aspect of this analysis is the merging of sometimes conflicting public policy considerations between federal labor and immigration laws. The ALJ had ordered the employer to mail reinstatement offers to the employees but declined to recommend an award of back pay since he believed the employees were unavailable for employment. The Board found no evidence to support the ALJ's conclusion that they had not returned to the United States or were unavailable for work, and modified the ALJ's recommendation by substituting the "conventional remedy of reinstatement with backpay."[146]

The employer argued that the remedy created an irresolvable conflict between federal labor and immigration laws by encouraging illegal

143. The principal issue in *Sure-Tan I* was whether the employer was obligated to bargain with the Board-certified union where a majority of the voting employees were illegal aliens. The legality of the discharges was not addressed although predicted. *Id.* at 360 n.9.

144. NLRB v. Sure-Tan, Inc., 672 F.2d 592 (7th Cir. 1982), *cert. granted*, 103 S. Ct. 1270 (1983).

145. 672 F.2d at 600, *citing* NLRB v. Haberman Constr. Co., 641 F.2d 351, 358 (5th Cir. 1981) (en banc).

146. 672 F.2d at 602.

entry into this country. The court was unpersuaded by this logic because it failed to recognize that the employees had voluntarily departed the country and had not been deported. This distinction is important because aliens who voluntarily depart enhance their prospects of later legally returning.[147] The court also believed the remedy would not likely serve as a sufficient inducement for the employees to return to collect their relief by illegal entry. For these reasons, the court held that the "remedy of backpay and reinstatement does not clearly flout the immigration laws."[148]

In *Sure-Tan I*, Judge Wood criticized the majority, as well as the Board, for ignoring the public policies underlying the federal immigration laws.[149] In *Sure-Tan II*, the employer filed a petition for rehearing *en banc*. The petition was denied, but Judge Wood, joined by Judges Pell and Coffey, again dissented.[150] He criticized the Board's "knothole" approach to the case and its failure to understand the whole problem presented by the unusual circumstances. In his mind, the Board and the court were not giving due consideration to federal immigration laws and he could not understand the "concocted remedy" of reinstatement at a time when unemployment of American workers was at a record high. He also reemphasized his view that congressional action was needed "to relieve some of the tension between labor and immigration policies."[151]

Recent Developments in Section 301 Suits

Statute of Limitations

Since Congress has not enacted a statute of limitations to govern actions brought pursuant to § 301,[152] the Supreme Court has held that the appropriate limitations period is to be determined by referring to state law.[153] In *United Parcel Service, Inc. v. Mitchell*,[154] the Supreme Court resolved the question of which state limitations period is the most appropriate. It held that the proper period is that governing ac-

147. *Id.* at 599 n.11, 603 n.16.
148. *Id.* at 604.
149. 583 F.2d at 361-62 (Wood, J., dissenting).
150. 677 F.2d 584 (7th Cir. 1982).
151. *Id.* at 585 (footnote omitted). Judge Wood noted that duplicate bills were pending in the Congress which appeared to address some of the problems created by *Sure-Tan I* and *II*. While the Senate approved a bill which, *inter alia*, subjected employers to civil and criminal penalties for knowingly employing illegal aliens (S. 2222), the House failed to reach a concensus on appropriate sanctions and adjourned without taking any action.
152. *See supra* note 4.
153. International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).
154. 451 U.S. 56 (1981).

tions to vacate arbitration awards and not that governing actions alleging breach of contract.[155] In *Davidson v. Roadway Express, Inc.*,[156] the Seventh Circuit had its first opportunity to apply the *Mitchell* rule under Indiana law in a suit by an employee against his employer. The application was a simple one inasmuch as Indiana law expressly provides a separate statute of limitations for actions to vacate an arbitration award.[157]

Two issues left unanswered in *Mitchell* have captured the attention of the lower courts, and recently the attention of the Supreme Court itself. The first is whether the same state limitations period should apply to both the union and employer. Several circuits have declared that different limitations periods are appropriate[158] while others have suggested otherwise.[159] The more interesting issue left undecided by *Mitchell* is whether borrowing a state limitations period is appropriate at all.

In *Mitchell*, the AFL-CIO, in an amicus brief, argued that the six month limitations period found in § 10(b) of the NLRA should be applied in § 301 suits.[160] The Court responded that certiorari was granted "to consider *which* state limitations period should be borrowed, not whether such borrowing was appropriate."[161] It also noted that the argument had not been raised below and would make no difference in the result reached. In his concurring opinion, Justice Stewart argued that § 10(b) should be the standard and that *Hoosier Cardinal* was no obstacle.[162] In his concurring opinion, Justice Blackmun found much of Justice Stewart's analysis persuasive, but stated that "resolution of the § 10(b) question properly should await the development of a full adversarial record."[163] And in his opinion, Justice Stevens argued that § 10(b) "rests on a rationale that might apply to a § 301 claim against

155. *Id.* at 62.

156. 650 F.2d 902 (7th Cir. 1981), *cert. denied*, 455 U.S. 947 (1982).

157. IND. CODE 34-4-2-13(b) (West Supp. 1982) (90 days).

158. *See* Hand v. Local 328, Int'l Chemical Workers Union, 681 F.2d 1308 (11th Cir.), *rehearing en banc granted*, 692 F.2d 714 (11th Cir. 1982); Edwards v. Sea-Land Serv., Inc., 678 F.2d 1276 (5th Cir. 1982).

159. *See* Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982).

160. 451 U.S. at 60 n.2. Section 10(b), 29 U.S.C. § 160(b) (1976), provides that "no complaint shall issue based upon any unfair labor practice occuring more than six months prior to the filing of the charge with the Board. . . ."

161. 451 U.S. at 60 n.2.

162. *Id.* at 65-71 (Stewart, J., concurring). *See also* San Diego County Dist. Council of Carpenters v. G.L. Cory, Inc., 685 F.2d 1137 (9th Cir. 1982) ("[A] uniform federal limitation period might be desirable but 'neither national labor policy nor section 301's text or legislative history supports creating one judicially.'" *Id.* at 1142).

163. 451 U.S. at 64-65 (Blackmun, J., concurring).

the union, but which is wholly inapplicable to the claim against the employer, because the employer is not accused of any unfair labor practice."[164] Even the Seventh Circuit in *Davidson* noted the § 10(b) issue, stating "that the logic of applying § 10(b) to a § 301 suit against a union seems less compelling when, as here, the § 301 suit is filed against the employer."[165] Thus, *Mitchell* left considerable room for lower courts to address the merits of the § 10(b) standard.

The Seventh Circuit, in several very recent decisions,[166] has expressed a willingness to follow the reasoning of Justice Stewart. A final decision in this troubled area should be forthcoming. The Supreme Court has granted certiorari in two cases which raise both the propriety of a § 10(b) standard and whether that standard, or the state limitations period, should be applied to both the employer and union.[167]

Exhaustion of Mandatory Intraunion Remedies

One of the more important labor law issues over which the courts have disagreed is the availability to the employer and union of the defense that an employee has failed to exhaust intraunion remedies before instituting a § 301 suit.[168] With respect to the employer, some courts hold that the defense is never available while others allow it provided certain conditions are satisfied.[169] With respect to the union, the defense is generally available unless the employee would be unable to obtain a fair hearing or full relief.[170] In *Clayton v. International Union, UAW*,[171] the Supreme Court resolved the division, holding that "where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion will not be required with respect to either the suit

164. *Id.* at 76 (Stevens, J., concurring in part, dissenting in part).

165. 650 F.2d at 904 n.2.

166. Hall v. Local 3, Printing & Graphic Arts Union, No. 82-1109 (7th Cir. December 21, 1982); Stevens v. Gateway Transp. Co., No. 82-1222 (7th Cir. December 22, 1982); Evans v. Maislin Transp., Ltd., No. 82-1426 (7th Cir. December 21, 1982).

167. Flowers v. Local 2602, United Steelworkers of Am., 671 F.2d 87 (2d Cir.), *cert. granted*, 103 S. Ct. 442 (1982); Costello v. International Bhd. of Teamsters, (4th Cir.), *cert. granted*, 51 U.S.L.W. 3419 (Nov. 29, 1982).

168. *See* Fox & Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989 (1980).

169. The Seventh Circuit rule provided that the defense is available to the employer if the internal appeals procedure could result in reactivation of the grievance. Miller v. Gateway Transp. Co., 616 F.2d 272 (7th Cir. 1980); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977).

170. The Seventh Circuit rule provided that the defense is available to the union where the internal union remedies are both mandatory and adequate. Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978).

171. 451 U.S. 679 (1981).

against the employer or the suit against the union."[172] Two cases this term applied this holding.

The first was remanded by the Supreme Court for further consideration in light of *Clayton*. In *Tinsley v. United Parcel Service, Inc.*,[173] the employee brought suit against the union and employer seeking only money damages. In its previous decision,[174] the court had affirmed the dismissal of the suit against the union but reinstated it against the employer because the relief of reinstatement or reactivation of the employee's grievance was not available from the union appeals procedure. In its decision after remand, the court reaffirmed the dismissal of the suit against the union but reversed itself with respect to the employer. Its reasoning was quite simple. Because the employee only sought monetary relief and not reinstatement, and the internal procedures could provide such relief, he could receive complete relief by pursuing his intraunion remedies. This was one of the standards enunciated in *Clayton*. Thus, exhaustion was required.

The issue before the court was far more difficult in *Miller v. General Motors Corp.*[175] The union and employer entered into a "Letter Agreement" which created an intraunion appeals procedure providing for the reinstatement of employee grievances if one of the internal appellate tribunals determined that the grievance had been improperly disposed of by union officials. Another provision of the agreement shielded the employer from back pay liability for the period of time between the initially improper disposition of the grievance and its later reinstatement. The employee challenged the adequacy of the intraunion procedures, specifically the backpay limitation proviso, as failing to satisfy the *Clayton* "complete relief" standards. The court disagreed.

The plain language in *Clayton* fully supports the court's decision. Exhaustion of intraunion procedures under *Clayton* is required wherever one of two results can be produced: *either* reactivation of the grievance *or* complete relief. "In either case, exhaustion of internal remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues."[176] The *Miller* court essentially applied a balancing test bearing in mind the policy considerations underlying the standard in *Clayton*. The importance of

172. *Id.* at 685. The court also mentioned two other factors that might excuse a failure to exhaust: (1) inability to obtain a fair hearing because of the hostility of union officials, and (2) unreasonable delay of a judicial hearing if exhaustion is required. *Id.* at 689.

173. 665 F.2d 778 (7th Cir. 1981).

174. 635 F.2d 1288 (7th Cir. 1980).

175. 675 F.2d 146 (7th Cir. 1982).

176. 451 U.S. at 692.

the private resolution of labor disputes was weighed against and took precedence over the individual employee's right to be fully compensated for the wrong he has allegedly suffered.[177]

Proper Defendants

The recently increased use by employers of specialized labor consultants to assist in stifling unionization, and destroying unionization once achieved, has provoked understandable and widespread furor in the labor community. The manner in which the conduct of such consultants fits into the scheme of § 301 was examined in *Loss v. Blankenship*.[178] The employer there hired Blankenship, a labor relations expert, for the acknowledged purpose of helping it to induce the decertification of the union. While not successful in achieving decertification, Blankenship did succeed in disrupting ratification of a collective bargaining agreement by inducing a strike. The Board found that the employer had violated the Act through the acts of its agent Blankenship.[179] Additionally, the union and several employees representing a class of all employees instituted a § 301 action against Blankenship personally seeking injunctive and monetary relief. The district court dismissed the complaint because Blankenship was not a party to the collective bargaining agreement upon which the complaint was based. The Seventh Circuit affirmed.

Relying upon similar decisions from 1969[180] and the Fifth Circuit,[181] the court construed § 301 as not providing the basis for a claim *against* a non-party to the underlying collective bargaining agreement. The court found that the scheme of liability under the LMRA itself supported this conclusion by providing that the employer would be liable for the wrongdoing of its agents.[182] Thus, the employees here were

177. The Supreme Court has recently granted review in a case which addresses this area in a little different manner. In Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir.), *cert. granted*, 454 U.S. 1097 (1981), the district court found that the employee had been discharged without cause and that the union had breached its fair representation duty. The employee was awarded back pay but the district court apportioned part of that award to the union because its conduct contributed to the accretion of lost wages. The Fourth Circuit reversed, reasoning that back pay was the exclusive obligation of the company. Whether a union, whose breach of fair representation duty contributed to an increase in lost wages, can be held liable for a fair portion of those lost wages is the issue presented to the Court. Union liability in § 301 suits was addressed by the Court in *Hines*, *Vaca* and *Czosek v. O'Mara*, 397 U.S. 25 (1970).

178. 673 F.2d 942 (7th Cir. 1982).

179. The Board petitioned for enforcement, *id.* at 945, but later had it withdrawn.

180. Baker v. Fleet Maintenance, Inc., 409 F.2d 551 (7th Cir. 1969).

181. Ramsey v. Signal Delivery Serv., Inc., 631 F.2d 1210 (5th Cir. 1980).

182. Section 301(b) of the LMRA, 29 U.S.C. § 185(b) (1976), provides that:

[A]ny labor organization which represents employees in an industry affecting commerce

not without a remedy. They had only selected the wrong defendant. This factor distinguished the case from Third and Ninth Circuit decisions permitting suit against a non-party[183] as well as a recent decision permitting suit against a competitor of the employer which had induced a breach of the collective bargaining agreement.[184] The ability to obtain full relief from the employer was the pivotal consideration in the court's holding "that a complaint for interference with a collective bargaining agreement, against a non-party to that agreement, is not actionable under § 301(a) of the LMRA."[185]

Injunctive Relief

The power of a federal court to issue injunctive relief during a labor dispute is a very narrow and limited one. The source of this restricted power is the Norris-LaGuardia Act of 1932 which withdraws from the federal courts all jurisdiction to issue injunctions in a case involving or growing out of a labor dispute.[186] Two decisions by the Supreme Court in the 1970's placed a judicial gloss on this statutory prohibition.[187] During this past term, the court reviewed the history of the labor injunction and applied the prevailing law to a management-labor dispute which is increasing in frequency.

In *Local Lodge No. 1266, International Association of Machinists v. Panoramic Corp.*,[188] a collective bargaining agreement contained a broad arbitration clause as well as a provision which made the agreement binding on "successors and assigns" of the employer. The em-

as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents.

183. Those cases are cited in 673 F.2d at 947-48.

184. Wilkes-Barre Publishing Co. v. Local 120, Newspaper Guild, 647 F.2d 372 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1003 (1982).

185. 673 F.2d at 948. In a separate count the plaintiffs alleged that Blankenship tortiously interfered with the contractual relationship between the union and employer. The court held that this state law claim falls within the federal court's diversity jurisdiction. It rejected Blankenship's contention that the membership of the entire international union must be considered in determining the local union's citizenship. *Id.* at 948-51.

186. 29 U.S.C. §§ 101-15 (1976). Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

See also 29 U.S.C. § 104 (enumeration of specific acts not subject to restraining orders or injunctions).

187. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976); Boys Markets, Inc. v. Local 770, Retail Clerks Union, 398 U.S. 235 (1970). *See also* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc., 102 S. Ct. 2673 (1982).

188. 668 F.2d 276 (7th Cir. 1981).

ployer announced that it was selling a division of its operations and that the proposed purchaser contemplated no changes in the terms and conditions of employment. Soon thereafter, the purchaser informed the employees that they all would be terminated and would have to reapply if they wished continued employment. The union protested to the employer and purchaser but to no avail. It then filed a grievance with the employer charging that its actions constituted a breach of the "successors and assigns" clause by failing to secure from the purchaser a commitment to assume the obligations under the existing contract. It also requested a postponement of the sale pending resolution of the grievance. The employer agreed to arbitration but refused to delay execution of the sale. The union then filed a complaint in federal district court seeking a preliminary injunction restraining the employer, pending arbitration, from completing the sale without requiring the purchaser to assume the contract. The district court granted relief.

The appellate court's opinion, by Judge Cudahy, provides a textbook summary of the labor policy considerations implicated by the labor injunction and comprehensively covers the judicial interpretations of *Norris-LaGuardia*. An in-depth analysis of the two landmark Supreme Court cases is also provided which serves as the centerpiece of the court's decision.

The key principle highlighted by the court is that labor dispute injunctions are specifically limited to those situations where such equitable relief is necessary to enforce the agreement to arbitrate between the employer and union. With this principle in mind, the court concluded that federal courts possess the authority to enjoin employer actions, as well as union actions, to preserve the status quo pending arbitration. It then adopted the standard announced in *Lever Brothers Co. v. Local 217, International Chemical Workers*,[189] holding that a *Boys Market* injunction[190] against employer breaches of a collective bargaining agreement may be issued "where the underlying dispute is subject to mandatory arbitration under the labor contract and where an injunction is necessary to prevent arbitration from being rendered a meaningless ritual."[191] It further held that, as in all *Boys Market* cases, the traditional equitable requirements of irreparable injury, a balance

189. 554 F.2d 115 (4th Cir. 1976).

190. Boys Markets, Inc. v. Local 770, Retail Clerks Union, 398 U.S. 235 (1970) (injunction may issue when the contract "contains a mandatory grievance adjustment or arbitration procedure" and the union has agreed to settle disputes through such procedures rather than resorting to a strike).

191. 668 F.2d at 283.

of hardships and probability of success on the merits will also be required.[192] Finding all of these requirements satisfied, the court affirmed the issuance of the injunction.[193]

REVIEW OF 1981-82 EMPLOYMENT LAW DECISIONS[194]

Age Discrimination

Two very important decisions were handed down this term under

192. *Id.*

193. *Contra*, United Automobile Workers v. LaSalle Machine Tool, Inc., No. 82-1223 (6th Cir., Dec. 29, 1982).

194. Due to the large number of employment related cases decided this past term, it is impossible to discuss each and every one. The following is a listing of decided cases not found in the text, accompanied with a brief statement of the holding or subject matter examined. Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982) (OSHA empowered to obtain inspection warrant *ex parte* under 29 C.F.R. § 1903.4; employer not entitled to advance notice from OSHA prior to its obtaining inspection warrant; striking employees or their representatives can be proper complainants under 29 U.S.C. § 657(f)(1)); Janowski v. Local No. 710, Int'l Bhd. of Teamsters, 673 F.2d 931 (7th Cir.), *cert. denied*, 103 S. Ct. 130 (1982) (complex and comprehensive examination of private pension plan's conformity with ERISA requirements, particularly accrual of benefits for part-time service); Local 194 C & T v. Consolidated Rail Corp., 672 F.2d 621 (7th Cir. 1982) (dispute regarding the allocation of work among various employee groups resulting from an agreement between Conrail and national union held subject to mandatory arbitration under 45 U.S.C. § 777); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982) (plaintiffs failed to demonstrate a significant or substantial statistical disparity indicating racial discrimination); Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982) (Title VII violation committed if black employee can show he was dismissed for attempting to prevent his superiors from discriminating against a female white employee on sex and race grounds); Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881 (7th Cir.), *cert. denied*, 103 S. Ct. 132 (1982) (agreement between public utility, contractor and union, calling for the deposit of funds into an escrow account during strike to continue work on utility's project, fell within both statutory and non-statutory labor exemptions to antitrust laws); Fire Equip. Mfr.'s Ass'n, Inc. v. Marshall, 679 F.2d 679 (7th Cir. 1982) (trade association representing manufacturers of fire-fighting equipment has no standing to challenge validity of amendment to fire safety standards in 29 C.F.R. § 1910); Jones v. United States, 680 F.2d 1138 (7th Cir. 1982) (decedent did not give constructive or implied notice that spouse was not to receive retirement annuity pursuant to 5 U.S.C. § 8341(b)); United States v. Professional Air Traffic Controllers Org., 653 F.2d 1134 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (federal court has jurisdiction to issue injunction against work stoppage by federal employees in violation of 5 U.S.C. § 7311); Chicago Cartage Co. v. International Bhd. of Teamsters, 659 F.2d 825 (7th Cir. 1981) (arbitration award of Joint Committee "drew its essence from the collective bargaining agreement"; no evidence to support employer charge that Committee was arbitrary, partial or engaged in acts of misconduct; court reporter not required at arbitration hearing); Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310 (7th Cir. 1981) (arbitration award upheld under Federal Arbitration Act, 9 U.S.C. § 10); United Rubber, Cork, Linoleum, and Plastic Workers Local 798 v. Donovan, 652 F.2d 702 (7th Cir. 1981) (sufficient evidence did not support Secretary's decision that certain union members were not eligible for worker adjustment assistance under Subchapter II, Part 2 of the Trade Act of 1974, 19 U.S.C. §§ 2271-2322 (1976)); English v. Local Union No. 46, 654 F.2d 473 (7th Cir. 1981) (union member had right, under 29 U.S.C. § 431(c), to seek access to the books and records of local as they relate to LM-2 reports filed by the union with the Secretary of Labor); Butler Lime & Cement Co. v. OSHA, 658 F.2d 544 (7th Cir. 1981) (citation issued to employer dismissed for OSHA's failure to comply with previous mandate of the court and the lack of substantial evidence supporting the Commission's decision); Super Excavators, Inc. v. OSHA, 674 F.2d 592 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 2958 (1982) (credibility determination by ALJ regarding expert

the Age Discrimination in Employment Act of 1967 (ADEA).[195] In *EEOC v. Elrod*,[196] the court decided the constitutionality of the 1974 amendment to the ADEA which extended the protections of the Act to federal, state and local government employees.[197] Exhaustively reviewing the legislative history of the ADEA and all its amendments,[198] as well as related federal employment legislation,[199] the court concluded that the amendment is a constitutional exercise of Congress' power under § 5 of the fourteenth amendment.[200] This decision is in accord with the overwhelming majority of cases which have decided this

testimony upheld in absence of contrary documentary evidence or physical facts; violation upheld despite the fact the violation posed no "significant risk" of harm to employee; 29 C.F.R. § 1926.652(b) not vague); Patterson v. Youngstown Sheet & Tube Co., 659 F.2d 736 (7th Cir.), *cert. denied*, 454 U.S. 1100 (1981) (computation of back pay and attorneys' fees against employer for Title VII violations not in error or abuse of discretion; refusal to hold union liable for back pay and attorneys' fees despite Title VII violation not an abuse of discretion; Alvarez v. Joan of Arc, Inc., 658 F.2d 1217 (7th Cir. 1981) (interpretation of 7 U.S.C. § 2050a(b) in Espinoza v. Stokely-Van Camp, Inc., 641 F.2d 535, 538-39 (7th Cir.), *petition for cert. dismissed*, 453 U.S. 950 (1981), overruled; statutory language to read "award damages up to $500 for each violation"); Martinez v. Swift & Co., 656 F.2d 262 (7th Cir. 1981) (actions of Pension Board following nationalization and expropriation of employer by Cuba not "arbitrary, fraudulent or in bad faith"); Saltzman v. Fullerton Metals Co., 661 F.2d 647 (7th Cir. 1981) (evidentiary and discovery rulings did not deprive plaintiff of fair trial for alleged Equal Pay Act violations); Boyd v. Madison County Mut. Ins. Co., 653 F.2d 1173 (7th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982) (maintenance of sexually discriminatory bonus attendance policy a continuing violation for Title VII purposes; employer successfully produced legitimate, non-discriminatory reason for limiting bonus plan to all clerical employees who happened to all be female, and not extending it to claims adjustors who happened to all be male); EEOC v. St. Anne's Hospital of Chicago, Inc., 664 F.2d 128 (7th Cir. 1981) (conciliation efforts by the EEOC prior to the issuance of a reasonable cause determination are not required under 42 U.S.C. § 2000e-5(f)(1)); Van Fossan v. International Bhd. of Teamsters Local 710, 649 F.2d 1243 (7th Cir. 1981) (for the minimum vesting requirements of § 203(a) of ERISA, 29 U.S.C. § 1053(a), to apply, "one must be an employee after its effective date and the forfeiture of one's benefits must occur after its effective date"; pension plan's "break in service" provision held not to be "arbitrary or capricious" where the break in service is voluntary); Marquardt v. North Am. Car Corp., 652 F.2d 715 (7th Cir. 1981) (criteria to be applied in determining the appropriateness of attorney's fees to ERISA defendants pursuant to 29 U.S.C. § 1132(g)(1)); Cannon v. Teamsters and Chauffeurs Union, 657 F.2d 173 (7th Cir. 1981) (restricted delivery agreement between liquor distributors and truck driver union exempted from antitrust laws because it concerned conditions of employment); Chicago Truck Drivers v. National Mediation Bd., 670 F.2d 665 (7th Cir. 1981) (assertion of jurisdiction by NMB over representation dispute involving Federal Express drivers not a final agency action subject to judicial review nor a recognized exception under Leedom v. Kyne, 358 U.S. 184 (1958)); United States v. Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc) ("changed circumstances" required modification by district court of permanent injunction establishing promotion quotas within the Chicago Police Department; evidentiary hearing required to examine Title VII validity of procedures used in compiling current promotion eligibility roster); Donovan v. Federal Clearing Die Casting Co., 655 F.2d 793 (7th Cir. 1981) (no probable cause for issuance of inspection warrant).

195. 29 U.S.C. § 621-34 (1976 & Supp. V 1981).

196. 674 F.2d 601 (7th Cir. 1982).

197. 29 U.S.C. § 630(b) (1976).

198. 674 F.2d at 604-07.

199. *Id.* at 607-09.

200. Section 5 of the fourteenth amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of this article."

issue.[201]

While not necessary to its decision, a majority of the panel also concluded that the amendment would be a constitutional exercise of Congress' power under the Commerce Clause. The local governmental body argued that the amendment violated the tenth amendment limitation on the Commerce Clause recognized in the landmark case of *National League of Cities v. Usery*.[202] In *National League*, the Supreme Court invalidated the 1974 amendments to the Fair Labor Standards Act extending coverage of the FLSA to state and local government employees on the ground that they impermissibly interfered with the "integral governmental functions" of the states and their political subdivisions.[203] As the 1974 ADEA amendment was included with the FLSA amendments during congressional enactment, the local governmental body contended that both should be treated in the same manner. Applying the circuit's narrow reading of *National League* and recognizing the far more limited intrusion on, and interference with, state and local sovereignty by the ADEA than the FLSA, the majority, with Judge Pell dissenting, had "no difficulty" in holding that if the 1974 ADEA amendment is viewed as an exercise of Congress' power under the Commerce Clause, the amendment does not conflict with the tenth amendment.[204]

In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*,[205] the court set forth the standard for willfulness under 29 U.S.C. § 626(b), a showing which is required before a plaintiff may recover liquidated damages under the ADEA.[206] Reviewing the divergent interpretations provided by several courts of appeals,[207] the court held that "a plaintiff must show that the defendant's actions were knowing and voluntary

201. Cases are cited in 674 F.2d at 609 n.9. In EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), the district court concluded that the ADEA was enacted pursuant solely to the commerce clause and not under the fourteenth amendment. It further concluded that the 1974 amendment intruded on state sovereignty in violation of the tenth amendment under National League of Cities v. Usery, 426 U.S. 833 (1976). *Accord*, Campbell v. Connelie, 542 F. Supp. 275 (N.D. N.Y. 1982). The Supreme Court reversed, however, finding the 1974 amendment constitutional and not in violation of the tenth amendment. E.E.O.C. v. Wyoming, 103 S. Ct. 1054 (1983).

202. 426 U.S. 833 (1976).

203. *Id.* at 851.

204. 674 F.2d at 612. *Accord*, Bleakley v. Jekyll Island-State Park Authority, 536 F. Supp. 236 (S.D. Ga. 1982).

205. 665 F.2d 149 (7th Cir. 1981).

206. Relief under the ADEA is limited to back pay. However, an additional equal amount is available in case of willful violation; 29 U.S.C. § 626(b) (1976) provides in pertinent part that: "[L]iquidated damages shall be payable only in cases of willful violations of this chapter."

207. The court cited and discussed Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980); and Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

and that he knew or reasonably should have known that those actions violated the ADEA."[208] The court went on to add that the latter factor "implies that the plaintiff must show two things: (1) that the employer knew or reasonably should have known what the requirements of the ADEA are; and (2) that the employer knew or reasonably should have known that his actions towards the plaintiff were inconsistent with those requirements."[209] The *Syvock* opinion goes on to apply its new interpretation of willfulness in addition to examining a number of damage issues, including mitigation, computational methods, unemployment compensation offset,[210] prejudgment interest[211] and attorneys' fees.[212] It should be required reading for any ADEA litigant.

Title VII

The 1981-82 term was marked by several significant decisions under Title VII,[213] each of which warrants detailed discussion beyond the space limitations of this article.

In *Unger v. Consolidated Foods Corp.*,[214] the employee unsuccessfully pursued her discrimination charge to the state administrative agency, the state trial court and the state appellate court. She then filed the identical action in federal court and ultimately prevailed. On appeal, the employer argued that the employee was precluded from pursuing her claim in federal court under the doctrines of collateral estoppel or election of remedies. The court rejected this argument based upon the fact that, except for the Second Circuit,[215] every court of appeals had rejected any application of the doctrines of res judicata, collateral estoppel or election of remedies to Title VII actions in federal

208. 665 F.2d at 156 (footnote omitted).

209. *Id.* n.10. The court noted that the first requirement should be easily met by the fact that the posting of notices is required under Department of Labor regulations. It is the second requirement which will pose the greatest obstacle for the plaintiff.

210. Whether to decrease a back pay award by an individual's unemployment compensation is a determination left to the sound discretion of the district court. *Id.* at 161-62. *Contra*, Kauffman v. Sidereal Corp., 677 F.2d 767 (9th Cir. 1982).

211. Prejudgment interest lies within the trial court's discretion. 665 F.2d at 162.

212. Award of attorney's fees should not be reduced by the plaintiff's failure to prevail on willfulness and mitigation questions. *Id.* at 162-65.

213. 42 U.S.C. § 2000e (1976).

214. 657 F.2d 909 (7th Cir. 1981). The employer subsequently filed a petition for writ of certiorari which was granted on June 1, 1982. 102 S. Ct. 2288. The judgment was vacated and the case remanded for further consideration in light of Kremer v. Chemical Const. Corp., 102 S. Ct. 1883 (1982), discussed in the next paragraph of the text. On remand, the Seventh Circuit, in response to the inquiries that Justice Blackmun suggested must be made, 102 S. Ct. at 2289, held that *Kremer* controlled and that: (1) the standards of review applied by the Illinois and New York courts were essentially the same, and (2) *Kremer* should be applied retroactively. 693 F.2d 703 (7th Cir. 1982).

215. Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), *cert. denied*, 444 U.S. 983 (1979).

court where there have been previous state proceedings.[216]

The *Unger* principle was overruled by the Supreme Court in *Kremer v. Chemical Construction Corp.*,[217] wherein the Court affirmed the rule of the Second Circuit that a federal court must, under the full faith and credit clause, give preclusive effect to a decision of a state court when the state court's decision would be res judicata in the state's own courts. The impact of *Kremer* from a practical standpoint could be greatly lessened if complainants elect not to seek state judicial review of adverse state administrative decisions.[218] Therefore, the important and unresolved issue left by *Kremer* is whether a state administrative decision, following a full and fair evidentiary hearing, is entitled to any res judicata or collateral estoppel effect in the federal action.[219]

In *Lehman v. Yellow Freight System, Inc.*,[220] a charge of reverse discrimination was before the court. A black employee was hired for a higher position over a white employee not pursuant to any formalized plan, but upon the branch manager's ad hoc consideration of race as a plus factor. The issue was whether the manager's action was permissible under the Supreme Court's decision in *United Steelworkers of America v. Weber*.[221] Informal affirmative action programs were not present in *Weber* but the *Lehman* court found that the public policy considerations discussed therein provided guidance. Those considerations include the need for affirmative action, whether the adopted plan satisfied that need and whether the plan would remain active once the

216. Cases are listed in 657 F.2d at 914. The Seventh Circuit was one of the first courts of appeals to adopt this principle in Batiste v. Furnco Constr. Corp., 503 F.2d 477 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

217. 102 S. Ct. 1883 (1982).

218. As Justice Blackmun pointed out in his dissent in *Kremer*: "The lesson of [*Kremer*] is: *An unsuccessful state discrimination complainant should not seek state judicial review*. If a discrimination complainant pursues state judicial review and loses—a likely result given the deferential standard of review in state court—he forfeits his right to seek redress in a federal court." 102 S. Ct. at 1909 (emphasis in original) (footnote omitted).

Justice Blackmun also pointed out another consequence of *Kremer* which could potentially frustrate the effectiveness and integrity of the state scheme:

> Indeed, a prudent discrimination complainant may make every effort to *prevent* the state agency from reaching a final decision. If the complainant prevails after a full hearing, he runs the risk that his adversary may seek judicial review. He could then find himself closed out of federal court if a state court decides that the agency's decision is unsupported by sufficient evidence.

Id. n.18 (emphasis in original).

219. *See* Snow v. Nevada Dep't of Prisons, 543 F. Supp. 752 (D. Nev. 1982) (administrative proceeding has no collateral estoppel effect but may be admitted as evidence in the federal court action).

220. 651 F.2d 520 (7th Cir. 1981).

221. 443 U.S. 193 (1979). For a comprehensive analysis of *Weber*, *see* Blumrosen, *Affirmative Action in Employment After Weber*, 34 RUTGERS L. REV. 1 (1981).

racial imbalances were eliminated.[222] The *Lehman* court found the manager's decision-making process seriously flawed under each factor. The hiring was made "without any idea of a goal for which minority hiring should reach nor with any idea of when such a level was reached."[223] This created the danger that non-minority employees would be treated unfairly after the racial imbalances had been remedied. The relatively haphazard nature of the manager's decision and the potential unfairness to non-minority employees posed by it, specifically the insufficiency of substantive and procedural safeguards, were the fundamental concerns of the court.

While concluding there was a Title VII violation, the court made a special effort to reassure civil rights advocates that its decision should not "be understood as a setback for affirmative action in general or affirmative action at smaller places of employment."[224] The court emphasized that its decision was made on a "unique record" and interposed "between the Scylla of *Bakke* and the Charybdis of *Weber*."[225] The precedential value of *Lehman* to affirmative action opponents will likely be scant.

One of the more difficult concepts in the area of employment discrimination for practitioners and courts alike is the continuing violation theory enunciated by the Supreme Court in *United Air Lines, Inc. v. Evans*.[226] In *Stewart v. CPC International, Inc.*,[227] the Seventh Circuit comprehensively summarized the various situations which give rise to a continuing violation.[228] The specific situation before it involved an allegation of continuous and covert discrimination evidenced by a series of discriminatory acts. The employer in the case challenged the suit as failing to comply with the EEOC time requirements for filing. The court stated that under this particular sub-theory:

> At least one discriminatory act must have occurred within the charge-filing period. Discriminatory acts that occurred prior to the period constitute relevant evidence of a continuing practice, and may help to demonstrate the employer's discriminatory intent. . . . But the prior discriminatory acts do not come into play at all unless the plaintiff can show in the first place that the discrimination is "pres-

222. 651 F.2d at 526-27.

223. *Id.* at 527.

224. *Id.* at 528 (footnote ommitted).

225. *Id.* (footnote omitted).

226. 431 U.S. 553 (1977). *See generally* Carty, *The Continuing Violation Theory of Title VII After* United Air Lines, Inc. v. Evans, 31 HASTINGS L.J. 429 (1980); Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119 (1978).

227. 679 F.2d 117 (7th Cir. 1982).

228. The court discussed three different situations to which a continuing violation theory has been applied, all summarized in Elliott v. Sperry Rand Corp., 79 F.R.D. 580 (D. Minn. 1978).

ently" continuing.[229]

It then held that the act relied upon by the plaintiff to establish that past discrimination continued into the present was not a Title VII violation because the plaintiff had failed to meet his burden of showing that the employer's asserted justification for its action was a mere pretext. Thus, there was no discriminatory act within the filing period and there was no continuing violation.[230]

In *EEOC v. Bay Shipbuilding Corp.*,[231] the EEOC applied to the district court for enforcement of a subpoena duces tecum which the court granted. On appeal, the employer raised numerous errors including the district court's refusal to allow it to file an answer or counterclaim or hold an evidentiary hearing. The court rejected each argument, reasoning that the employer was applying an overly technical and formalistic analysis of the administrative subpoena enforcement process.[232] Moreover, all of the employer's essential points were contained in the record which the district court fully reviewed. Thus, nothing was sacrificed in terms of fact or argument in denying the filing of an answer or counterclaim. As there were no facts in dispute, the employer suffered no prejudice from the absence of an evidentiary hearing.

One of the other objections raised by the employer concerned the breadth of the subpoena by its inclusion of confidential information. The court summarily dismissed this argument by relying on the criminal penalties contained in 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) for EEOC personnel who disclose investigatory information.[233]

An interesting factual situation was before the court in *EEOC v. St. Anne's Hospital of Chicago, Inc.*[234] There, a white female manager hired a black man to fill a security position at the hospital. The hospital received threats against the life of the manager for the hiring and several unexplained fires occurred. As a result, the hospital dismissed her. The issue was whether the proscriptions of Title VII's "opposition clause," 42 U.S.C. § 2000e-3(a), applied.[235] The hospital argued that this clause applies solely to an individual who opposes a practice of an

229. 679 F.2d at 121.

230. In a single paragraph, the court also rejected plaintiff's assertion of a "present-effects-of-past-discrimination" theory of continuing violation. *Id.* at 122.

231. 668 F.2d 304 (7th Cir. 1981).

232. 29 U.S.C. § 161(2) (1976).

233. Those criminal penalties include a fine of not more than $1,000 or imprisonment of not more than one year.

234. 664 F.2d 128 (7th Cir. 1981).

235. 42 U.S.C. § 2000e-3(a) (1976) provides in part:

It shall be an unlawful employment practice for an employer to discriminate against any

employer that has unlawfully discriminated against minorities. The majority declined to accept such a narrow interpretation. They concluded that "an employee with hiring authority who hires the applicant she believes is best qualified and subsequently is discharged because the applicant she hired is black is similarly protected."[236] They were unwilling to allow employees in decision-making positions to be constantly concerned with losing their jobs by hiring a minority person and thereby inciting the racial bias of others. In response to the hospital's position that the threats were the reason for the discharge and not her hiring decision, the majority analogized the argument to "customer preference" cases and rejected it, stating that "[i]t would be a sad day for the enforcement of Title VII if every unlawful threat of violence motivated by racial hate could make lawful the discharge of an employee for a hiring decision that was itself required by the Act."[237]

The majority was not entirely insensitive to the plight of the hospital. They stated that no violation would be found if the hospital could demonstrate that no alternative course of action was available and that it could not continue to function safely with that employee remaining in her position.[238] In the majority's view, enlistment of increased police protection and investigation could have alleviated the threat. Disagreement on this point prompted Judge Pell to dissent.[239] He believed it was clear that the employee had not been terminated for hiring a black man but because of the threats and fires. Under the particular dangers presented to patient welfare and safety, he could not fault the hospital for its actions and, indeed, suggests that not taking that action might have been characterized as irresponsible. It was the nature and reality of the threats which mandated that the action be taken. Acknowledging the majority's position that other less severe alternatives were available, Judge Pell responded: "[N]o one . . . will ever know whether taking other steps might have been followed by a disaster of substantial extent."[240] He added that the hospital's action was nothing more than, at most, a "poor business judgment call,"[241] and not an act of racial discrimination which Title VII was designed to eliminate.

of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . .

236. 664 F.2d at 132 (footnote omitted).

237. *Id.* at 133.

238. *Id.* at 133-34.

239. *Id.* at 134-35 (Pell, J., dissenting).

240. *Id.* at 135.

241. *Id.*

In *Garcia v. Rush-Presbyterian*,[242] an individual alleged that he was not hired for a position because he was a Latino and that a white applicant was instead hired. One of the arguments asserted by the plaintiff was that the burden was upon the employer to show that the person hired was more qualified than him, and that absent such a showing, he was entitled to a favorable finding. The court rejected this argument, relying on *Texas Department of Community Affairs v. Burdine*.[243]

This same burden question was examined by the Court of Appeals for the District of Columbia Circuit in *Aikens v. United States Postal Service*.[244] In that case, the appellate court held that the district court erred in imposing upon the plaintiff the initial burden of proving that he was as qualified or more qualified than the person who was promoted. Such a showing is unnecessary to make a *prima facie* case.[245] The Supreme Court had previously granted the Postal Service's petition for writ of certiorari and remanded the case to the court of appeals.[246] Certain questions surrounded *Aikens* in light of the Supreme Court's action, despite Justice Marshall's eloquent dissent,[247] vacating and remanding it for further consideration in light of *Burdine*, a case the lower court had expressly relied upon in its previous decision. On remand, the court of appeals again held that a plaintiff, to establish a *prima facie* case, need not show that he was more qualified than the person actually selected.[248] The case has returned to the Court and a final decision on the merits will be rendered.[249] It could be one of the most important employment discrimination decisions the Court will render.

OSHA

Two extremely important decisions were handed down by the court this term concerning the vagueness of OSHA regulations. The panel in both decisions was comprised of Chief Judge Cummings, Senior Judge Swygert and Senior District Judge Jameson.

242. 660 F.2d 1217 (7th Cir. 1981).
243. 450 U.S. 248 (1981).
244. 642 F.2d 514 (D.C. Cir. 1980), *vacated and remanded*, 453 U.S. 902 (1981).
245. In addition to *Burdine*, the court relied upon McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).
246. 453 U.S. 902 (1981). The petition for writ of certiorari by Aikens was denied in 453 U.S. 912 (1981).
247. *Id.* at 3135-37 (Marshall, J., dissenting).
248. 665 F.2d 1057 (D.C. Cir. 1981).
249. *Cert. granted*, 102 S. Ct. 1707 (1982).

In *Matter of Metro-East Manufacturing Co.*,[250] the issue was whether an employer could prohibit the attaching of personal air sampling devices to its employees. The relevant agency regulation authorizes OSHA officers "to take environmental samples" and "to employ reasonable investigative techniques" in making their inspections.[251] The regulations fail, however, to define what is a "reasonable investigative technique." Only in OSHA's Field Operations Manual are personal sampling devices expressly mentioned and approved.

The district court, relying on a Ninth Circuit decision,[252] held that the employer was not required to have attached to its employees personal sampling devices, at least in the absence of a statute or regulation which expressly declares that these devices are reasonable. The majority, with Judge Swygert dissenting, affirmed but not on the ground that personal sampling devices were not a "reasonable investigative technique." Rather, the court held that the employer was not given "fair warning" of what is required or prohibited by the regulation. More specifically, "nowhere in the applicable regulations is the use of personal sampling devices identified as a 'reasonable' investigative technique."[253] The Secretary had every opportunity to clarify the regulation to conform to OSHA's long held interpretation and practice and to remedy the consequences of the Ninth Circuit decision. Having failed to do so, civil contempt sanctions could not be imposed.

In a case heard the same day as *Metro-East* and decided eleven days later, *Kropp Forge Co. v. Secretary of Labor*,[254] the court addressed a similar vagueness problem. An OSHA regulation provided that a "continuing effective hearing conservation program" is to be administered in areas of excessive noise.[255] The employer in the case was charged with violating this regulation and assessed a monetary penalty after the ALJ found that the violation was "willful-serious." Specifically, the ALJ found that the employer's hearing conservation program lacked six necessary elements. The court, now including Judge Swygert, overturned this administrative decision on the ground that the regulation was unenforceably vague.

The court held that the regulation failed to give fair warning to employers that these six specific elements must be satisfied. In fact,

250. 655 F.2d 805 (7th Cir. 1981).
251. 29 C.F.R. § 1903.7(b) (1982).
252. Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979), *aff'g*, 452 F. Supp. 575 (D. Mont. 1978).
253. 655 F.2d at 811.
254. 657 F.2d 119 (7th Cir. 1981).
255. 29 C.F.R. § 1910.95(b)(3) (1980).

various past actions on the part of OSHA indicated that several of these elements were not considered mandatory.[256] Additionally, after the administrative decision in this case, the regulation in question was withdrawn and replaced with one that expressly listed the six elements.[257] The court interpreted this action as "acknowledging that these elements were not previously included in the standard before us."[258] The court also noted that the regulation was found unenforceably vague in two previous decisions by ALJs, the first as early as 1976.[259] As in *Metro-East*, the court stressed the fact that the Secretary had been alerted to the regulation's vagueness problems and had ample opportunity to cure them but failed to do so. The burden must rest with the Secretary to promulgate regulations that are clear and specific with respect to scope, coverage and requirements.

Attorney's Fees

One of the remedies available to an aggrieved plaintiff under Title VII is an award of reasonable attorney's fees as part of the costs.[260] In recent years, litigation over the reasonableness of fees has often overshadowed the merits of employment actions. A perfect illustration is the court's decision in *Chrapliwy v. Uniroyal, Inc.*[261]

In *Chrapliwy*, the issue before the court was whether time expended by plaintiffs' counsel in a proceeding under Executive Order 11246 seeking debarment of the defendant from federal contracts,[262] a proceeding in which plaintiffs were not parties, is compensable where the effort expended by plaintiffs' counsel in the administrative proceeding directly contributed to and was primarily responsible for the settlement of the related Title VII action. The district court concluded that such time is not compensable based upon the language of § 706(k) of Title VII[263] and the Supreme Court's decision in *New York Gaslight Club, Inc. v. Carey*.[264] It reasoned that *New York Gaslight Club* was

256. 657 F.2d at 122-23.
257. *Id.* at 123, *citing* 46 Fed. Reg. 4162-64 (1981).
258. *Id.*
259. *Id.*
260. Section 706(k), 42 U.S.C. § 2000e-5(k) (1976), provides:

> In any action or proceeding under [Title VII] the court . . . may allow the prevailing party . . . a reasonable attorney's fee. . . .

261. 670 F.2d 760 (7th Cir.), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 19, 1982).
262. Executive Order 11246 prohibits discrimination against employees by federal contractors. One sanction which can be imposed is debarment from existing contracts and ineligibility for future contracts.
263. *See supra* note 260.
264. 447 U.S. 54 (1980).

limited to time spent on proceedings mandated by Title VII. The administrative proceeding here, while admittedly successful, was not mandated by Title VII. The Seventh Circuit declined to give *New York Gaslight Club* such a narrow reading. It believed Title VII's attorney's fee provision should be liberally construed, especially here where the district court had earlier approved and encouraged the plaintiffs' administrative efforts and where there was no dispute that the administrative efforts brought about a successful conclusion to the Title VII litigation. This same reasoning was also used to overturn the district court's narrow interpretation of § 706(k). Liberal construction was the theme of the court's decision in *Chrapliwy*.

The implications of the *Chrapliwy* decision are frightening to employers and an enormous benefit to Title VII plaintiffs. How far does *Chrapliwy* extend? The court stressed the fact that the plaintiffs' administrative efforts were successful and directly responsible for the Title VII victory. Would fees for that time be appropriate had the plaintiffs not prevailed in the administrative proceeding or where the administrative victory was shown to be inconsequential to the Title VII victory? How far beyond the forums expressly provided for in Title VII may a plaintiff go in seeking a favorable resolution of an employment discrimination claim? And will attorney's fees always be appropriate for time expended in those forums?[265] These are some of the issues left unanswered by *Chrapliwy*.

The second important holding of *Chrapliwy* concerns reasonable billing rates. The district court had limited plaintiffs' out-of-town counsels' billing rates to those prevailing in the local community of the district court. The Seventh Circuit held that this limitation would only be proper where "there is reason to believe that services of equal quality were readily available at a lower charge or rate in the area where the services were to be rendered."[266] It then concluded that the extreme complexity of the litigation justified plaintiffs' efforts to seek expert counsel from any geographical region, without counsel being forced to accept a reduction in his otherwise normal and reasonable billing rate. Another important fact was the defendant's retention of expensive, highly respected out-of-town counsel. This legitimized the plaintiffs' need to seek the most able counsel available from any geographical area.[267]

265. *See* Sullivan v. Pennsylvania Dep't of Labor & Indus., 663 F.2d 443 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1716 (1982) (time spent on arbitration proceeding compensable).

266. 670 F.2d at 769.

267. In Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), the Court of Appeals for the

In *Bugg v. International Union of Allied Industrial Workers*,[268] the prevailing defendant-appellee was granted attorney's fees for time spent on the appeal of the action. The court believed that the congressional intention of protecting defendants from burdensome litigation having no legal or factual basis, discussed in *Christiansburg Garment Co. v. EEOC*,[269] is just as applicable to defendants in the appeal stage as it is in the trial stage. Such an award is available, however, only where plaintiff's appeal is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[270] The court added that "[a]lthough a district court's determination that the plaintiff's original action was frivolous or meritless may be probative of the efficacy of the appeal, such a determination is neither necessary nor sufficient to support an appellate award."[271]

Another issue arising from *New York Gaslight Club* was addressed by the court in *Unger v. Consolidated Foods Corp.*;[272] whether plaintiff's counsel is entitled to recover attorney's fees for time expended during unsuccessful state proceedings. The court held there was such an entitlement based primarily upon a passage from the *New York Gaslight Club* opinion wherein the Supreme Court stated it would be "anomalous" not to award fees for time spent in unsuccessful or only partially successful proceedings.[273] Ultimate success in the federal action is now the only requirement for the recovery of fees for state proceedings.

One last Title VII attorney's fee case merits mention. In *Stewart v. Hannon*,[274] the plaintiffs brought a suit challenging an examination given to prospective assistant school principals. The district court dismissed the case but, while on appeal, the defendants ended use of the exam. The plaintiffs then petitioned the district court for attorney's fees which were denied for the reason that they were not prevailing parties. The Seventh Circuit affirmed this decision on the basis that there was "sufficient evidence in the record to support the district court's findings and the district court's finding that the plaintiffs were not prevailing parties is not clearly erroneous."[275] The standard gov-

District of Columbia reached an opposite result, holding that the relevant community is the one in which the district court sits.

268. 674 F.2d 595 (7th Cir. 1982).
269. 434 U.S. 412 (1978).
270. 674 F.2d at 600 (footnote omitted).
271. *Id.* n.10.
272. 657 F.2d 909 (7th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2288 (1982).
273. 657 F.2d at 920, *citing* 447 U.S. at 66.
274. 675 F.2d 846 (7th Cir. 1982).
275. *Id.* at 852.

erning whether a plaintiff is a prevailing party in the "practical sense" was set forth in *Dawson v. Pastrick*,[276] and the court's discussion of those standards to the facts before it is valuable.

Union Elections

Two decisions were rendered this term in cases involving actions brought by the Secretary of Labor alleging violations of the election rules of Title IV of the Labor Management Reporting and Disclosure Act of 1959.[277] In *Marshall v. Local 1010, United Steelworkers*,[278] the incumbent faction decided that only one voting booth would be present at each voting site, knowing this to be totally inadequate and resulting in members voting openly on tables. Furthermore, the incumbent faction knew that a secret ballot was required under federal law. On the day of the election, it became apparent that the challenger for the highest office would be victorious. He was assured, however, by high officials of the incumbent faction that he would never take office. After the election was concluded, officials of the incumbent again violated federal law by ordering the burning of unused ballots. The challenger won the election by a 2-1 margin but protests to the election were filed by the incumbent union which were rejected by internal union tribunals.

The district court concluded that the absence of a secret ballot could not have affected the outcome of the election primarily on the basis that the challenging faction had won the election in a landslide. The Seventh Circuit disagreed, reasoning that the secrecy requirement is not intended only for the benefit of the challenger.[279] The appellate court declined to fashion a *per se* rule that secrecy violations always "may have affected" an election outcome but held that the union was unable in this instance to rebut the *prima facie* showing of a violation made by the Secretary. Despite a finding of a violation, the court agreed with the alternative holding of the district court that a rerun election was not required in these circumstances. Finding a suit under LMRDA to be essentially an equitable proceeding,[280] the court held that "where, as here, the incumbent faction was responsible for the intentional and blatant violations which occurred, and threatened to and

276. 600 F.2d 70 (7th Cir. 1979). *See also* Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149, 162-65 (7th Cir. 1981).

277. 29 U.S.C. §§ 401-531 (1976 & Supp. V 1981).

278. 664 F.2d 144 (7th Cir. 1981).

279. *Id.* at 148.

280. *Id.* at 149. *Accord*, Kupau v. Yamamoto, 622 F.2d 449 (9th Cir. 1980); Usery v. International Org. of Masters, Mates and Pilots, 538 F.2d 946 (2d Cir. 1976).

has attempted to use these violations as a basis of unseating their challengers, the district court has the inherent equitable power to consider these facts and to mold the decree to fit the facts."[281] Ordering a rerun election would have had the perverse result of encouraging and rewarding deliberate violations of the federal laws. While finding no need for a rerun election in this case, the court noted that such a result will be "rare."[282]

In *Donovan v. Illinois Education Association*,[283] the court examined the sensitive issue of racial and ethnic restrictions in union by-laws governing the election of officers. The union leadership in that case was made up of a 600 member assembly and a fifty member Board of Directors. In 1974, the union's by-laws were amended in two ways. First, members of four minority groups were guaranteed 8% of assembly membership. If that level was not reached by the ordinary electoral process, the Board of Directors was directed to enlarge the total number in the assembly as necessary and appoint minority members to the level where 8% of the total body was comprised of minority members. Second, the size of the Board of Directors was increased to fifty-four with the four additional seats reserved for minority members. These four seats were in addition to those held by minority members through the normal election process. The Secretary filed challenges against these provisions which were rejected by the district court.

The court, through Judge Posner, emphasized at the beginning of its analysis that the case did not involve the legality of affirmative action. This was a case brought under the LMRDA and not under any civil rights statute or the equal protection clause of the fourteenth amendment. There was also no evidence suggesting that the union had engaged in any discriminatory conduct in the past which the by-laws were intended to overcome. Thus, the standards applied by the court were the same standards applied in any other case involving provisions affecting union elections.

The court initially recognized the obvious effect of the by-laws: a limitation on members' eligibility for office and the right to vote for candidates of one's choice. Assuming that the vast majority of union members are white, the effect of the by-laws was to preclude a majority of the members from running for election to the seats in the Assembly and appointed to Board seats reserved for minority members. While 29

281. *Id.* at 152.
282. *Id.* at 151.
283. 667 F.2d 638 (7th Cir. 1982).

U.S.C. § 481(e) allows "reasonable qualifications" to be placed on candidacy,[284] the court could not find any case where a qualification which excluded a majority of the membership was found reasonable.[285] The court also noted the danger created by the by-laws of perpetuating the strength of the incumbent union. The Board of Directors was empowered to appoint additional minority members to the Assembly, the same body that elects members of the Board. Such a danger posed a threat to democratic values.[286]

Despite these problems with the by-laws, the court refused to conclude that no set of facts could justify the restrictions.[287] No evidence was presented by the union showing its racial and ethnic composition and how the by-laws helped promote greater and more equal representation for the selected minority groups. The by-laws also failed to treat each minority group separately. Rather, the four groups were all lumped together for purposes of the by-laws. For instance, the four additional Directors could all be Asian. This would not, however, necessarily remedy the underrepresentation of the other minority groups which was the probable aim of the by-laws. For all these reasons, the court concluded that the racial and ethnic restrictions were invalid.

Constitutional Law

Two cases this term presented difficult issues regarding the power of a police force and a school board to limit the first amendment rights of its employees. Each centered upon the scope of the abridgement and the nature of the state interests being asserted as justification.

The police force case, *Mescall v. Rochford*,[288] centered upon a rule of the Chicago Police Department which prohibited officers from being members of any union whose membership was not exclusively limited to full time law enforcement officers. The rule did not apply to an officer's secondary employment. The need or interest asserted by the Department was that police officers must appear to be impartial and neutral in the handling of labor disputes. The appellate court adopted the district court's opinion which held that the Department had "cho-

284. 29 U.S.C. § 481(e) (1976) provides in pertinent part:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate to hold office (subject to . . . reasonable qualifications uniformly imposed). . . .

285. 667 F.2d at 641.

286. *Id.*

287. *Id.* at 641.

288. 655 F.2d 111 (7th Cir. 1981).

sen an arbitrary, irrational and impermissibly overbroad method of insuring" impartiality and neutrality.[289] Two aspects of the rule were particularly troublesome. The first was that portion of the rule which imposed no limitations on union membership for an officer's secondary employment. The same type of conflict of interest problem sought to be eliminated by the rule was being created by its exception. The second aspect was that the rule permitted officers to join civic, fraternal, ethnic and patriotic organizations. The court noted that, here too, "dual allegiance" problems might arise which run contrary to the primary purpose of the rule.[290] In sum, the court concluded that the Department acted unreasonably and arbitrarily in selecting this rather narrow area to preserve and enforce neutrality.

In a concurring opinion, Judge Cudahy correctly emphasized other first amendment deficiencies with the rule.[291] The overbreadth of the rule is evident in that it precludes an all-police local from affiliating with a national or international. The possibility of conflict is not sufficiently present in that instance to justify abridgement. Further, the rule bans membership in all unions with non-police members, even those whose non-police members assert no right to strike. Here again, the possibility of conflict is greatly lessened insasmuch as the officer will not likely be called upon to cross a picket line.

The first amendment school board case is *Perry Local Educators' Association v. Hohlt*.[292] The issue there was the constitutionality of a collective bargaining agreement between a teacher's union and a school board that permitted the incumbent union to use the school district's internal mail system but compelled the school district to deny that right to competing unions. The agreement did not prohibit the use of the system to any other person or organization. Applying a "rigorous scrutiny" standard of review,[293] the court, disagreeing with several others,[294] found the agreement to be in violation of the first amendment.

The school district asserted two state interests behind the rule. The first was that it assisted the incumbent in fulfilling its legal duties to the teachers with respect to bargaining and contract administration. The second was that it was necessary to ensure "labor peace" in the

289. *Id.* at 112.
290. *Id.* at 113-14.
291. *Id.* at 114-15 (Cudahy, J., concurring).
292. 652 F.2d 1286 (7th Cir. 1981), *consideration of jurisdiction postponed until hearing on the merits*, 102 S. Ct. 997 (1982).
293. *Id.* at 1293, 1294, 1296.
294. *Id.* at 1289 n.7.

school system. The court found the first justification to be both overinclusive and underinclusive in that it did not restrict the incumbent to use of the system only for that purpose but permitted other persons or organizations, who owed no special duties to the teachers, to use the system.[295] The school district could not adequately justify giving the incumbent the exclusive right to use. With respect to the labor peace justification, there was simply nothing to support the school district's contention that more open access might incite work stoppages or create hostility among employees.[296] The court found that the provision favored the majority union, so that "teachers inevitably will receive from [the majority union] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by the [minority union]."[297] Finding the degree of abridgement substantial and the state interests unachievable by the exclusivity rule, the court reversed the district court and found the rule to be unconstitutional.[298]

CONCLUSION

The 1981-82 term of the Seventh Circuit was marked by an unusually large number of significant decisions. This is best evidenced by the number of issues addressed by the court which have reached the docket of the Supreme Court. The *Wright Line* "dual motive" analysis, the *prima facie* showing required under Title VII, the obligations of a union steward during an illegal work stoppage, the first amendment implications of public sector collective bargaining agreements containing provisions favoring the incumbent union, and the constitutionality of the state and local government provision of the ADEA will all be subjects of Supreme Court review during the next year.

One other characteristic stands out from the past term. Just as the Supreme Court has experienced a major increase in workload and docket, so has the Seventh Circuit, especially in labor and employment law. The impact of this development requires careful monitoring to ensure that scholarship excellence will be maintained despite the enormous strain placed on the court.

295. *Id.* at 1300.
296. *Id.* at 1300-01.
297. *Id.* at 1296.
298. For further discussion of this case, *see* Viera, *Compulsory Public-Sector Collective Bargaining in the United States Supreme Court:* Perry Education Association v. Perry Local Educators' Association, GOV'T. UNION REV. (Spring 1982).